United States Court of Appeals

for the Second Circuit

APPENDIX

76-1475

B p/s

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v.—

MAX KAVALER,

Appellant.

APPELLANT'S APPENDIX

KOSTELANETZ & RITHOLZ
Attorneys for Appellant
80 Pine Street
New York, New York 10005.

ROBERT B. FISKE, JR.
United States Attorney for the Southern District of New York, Attorney for Appellee,
1 St. Andrews Plaza
New York, New York 10007.

UNITED STATES COURT OF APPEALS
FILED
DEC 7 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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0852

KAVALER, MAX

18:371 Conspr. to defraud U.S.
18:287 False claims.
18:1001 False statements.

10/7

1-29-76 3-11-76

Joel N. Rosenthal
791-1918

Singer & Bach
26 Court St., Brooklyn, NY 11242
858-4400

3-11-76	Filed indictment. Case assigned to Judge Brieant superseding 76 Cr 110.
4-2-76	Deft (Atty Irving B. Singer). Deft pleads NOT GUILTY. P.O.S.. Suppression hearing begun & concluded. Motion Denied...BRIEANT,J. Pollack, J.
4-9-76	Filed Deft's Motion & Affdvt in reference to promised immunity with ENDORSEMENT on same. MOTION DENIED. See Transcript of hearing this date. SO ORDERED....BRIEANT,J. (m/n 4-2-76)
4-19-76	Filed Deft's affdvt & notice of motion for an order dismissing all those counts of the indictment which, on the face thereof, are barred by the statute of limitations. Ret: 4-26-76
5-13-76	Filed consent order substituting William Babitt as atty for deft...Brieant,J.
6-7-76	Filed transcript of record of proceedings, dated 4-9-76
06-03-76	Filed notice of appearance of William Babitt as atty. for deft.

- OVER-

A

UNITED STATES COURT OF APPEALS
FILED
OCT 26 1976
SAMUEL FISHER, CLERK
SECOND CIRCUIT

-76	Filed memo end. on motion filed 04-19-76 motion withdrawn in open court by successor counsel.....HURFAIT,J.
6-17-76	Filed Govt's notice of readiness for trial on or after 7-19-76
7-6-76	Filed affid for W/H/C Ad testificandum Writ ret. 7-19-76
7-6-76	Filed affid for W/H/C Ad Testificandum writ ret 7-19-76
7-7-76	Fld Order that deft's oral motion made 7-6-76 for a severance & separate trial of certain cts of the indictment from the cts as set forth in the transcript of the hearing held thereon is in all respects denied....Tyler,D.J.
7-13-76	Fld affid & notice of motion for an order staying the Govt from all proceedings in connection with an investigation of the claims violation by the deft & for such other relief as to the Court may seem just & proper ret date 7-19-76
7-15-76	Fld memo end on motion fld 7-15 76 Motion denied see transcript of hearing of this date..So ordered Bonsal,D.J.
7-22-76	Filed Deft's proposed questions on voir dire.(w.drawn)
-19-76	Jury-trial begun.
-20-76	trial cont'd.
-21-76	trial cont'd.
-22-76	trial cont'd.
-23-76	trial cont'd.
-26-76	trial cont'd.
-27-76	trial cont'd.
-28-76	trial cont'd.
-29-76	trial cont'd. & concluded. Jury verdict Defendant guilty on counts 1,2,5,6,8,9,10,11,15,16,18,21,22,26 & 27. Defendant guilty on counts 19 and 24. Pre-sentence investigation ordered and sentence adjourned until 9-17-76, 2:00 P.M. Frankel, D.J.
8-2-76	Filed Deft's requests to charge.
8-2-76	Filed Govt's Request to Charge.
8-2-76	Filed Govt's requests on Voir Dire.
8-14-76	Filed W/H/C AD Test. directed to Warden, MCC, 150 Park Row, N.Y.C., for one Arthur Krieger. Writ returned unexecuted, as Deft is serving week-ends. So notified.
8-17-76	Filed W/H/C AD Test, directed to MCC, 150 Park Row, NYC, for one Elliott Burton Martin, with Marshal's return. Writ ececuted 7-22-76.
9-13-76	Filed defts. notice of motion for an order pursuant To Rule 33 of the F.R.C.P. setting aside the verdict of guilty against the deft. and to grant a new trial ret. 9-17-76.
9-22-76	Fld Govt's affid in opposition to motion for new trial

(Cont'd on pg 3)

FOR ARTICLES IN PAYMENT			
	VOUCHER	DATE	CD. NUMBER

B

UNITED STATES COURT OF APPEALS
FILED
OCT 26 1976
AMELIA G. GARCIA, CLERK
SECOND CIRCUIT

Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Ord Judgment
9-24-76	Fld memo and on motion fld 9-13-76 motion denied after an evidentiary hearing See findings & conclusions set for intranscript this date.....Brieant,J. M/N	
9-29-76	Filed Judgment & Committment Order= The Deft is hereby committed to the custody of the Atty General for imprisonment for a period of FOUR (4) YEARS on each of COUNTS, 1,2,,5,6,9,10,11,15,16,18,21,22,26 and 27, to run concurrently with each other. Pursuant to Title 18, U.S. Code, Sec.4205(b)(2), Deft shall become eligible for parole at such times as the Parole Commission May determine. Deft on his own recognizance pending appeal.....CHARLES L. BRIEANT, J.	
10-7-73	Filed Deft's Notice of Appeal to the U.S.C.A. for the 2nd Circuit from the Judgment & Order entered on 9-29-76 & order of 9-24-76. (n/n)	
11-26-76	Filed transcript of proceedings dtd.July 19,20,21,22 1976	
	" " " " " July 23,26,27 1976	
	" " " " " Sept 17,1976	
	" " " " " Sept 29,1976	
	" " " " " July 28, 1976	
	" " " " " July 14,1976	
	" " " " " June 3,1976	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____ Deputy Clerk

A 4

JUDGE BRIEANT

M-I316

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

241

UNITED STATES OF AMERICA

- v -

MAX KAVALER,

Defendant.

INDICTMENT

76 Cr.

The Grand Jury charges:

1. On July 30, 1965, Title XIX of the Social Security Act (the "Medicaid Act") was enacted creating the Medicaid program.

2. Pursuant to the Medicaid Act, the United States Department of Health, Education and Welfare shares with each state the cost of medical services to families with dependent children and to aged, blind, or permanently and totally disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services.

3. The Medicaid program further provides for rehabilitative and other services to help such families and individuals attain or retain capability for independence and self-care.

4. Pursuant to the Medicaid Act each state must promulgate a plan for Medicaid assistance.

5. On May 1, 1966 the State of New York enacted a statewide medical plan in accordance with the provisions of the Medicaid Act.

6. The New York State Social Welfare Law vests responsibility for the medical assistance program within New York State in the State Department of Social Services.

7. The Department of Social Services of the City of New York, located at 330 West 34th Street in Manhattan, processes and pays claims by various providers for Medicaid services rendered within New York City. The nature and amount of all such claims is reported monthly by New York City to the New York State Department of Social Services.

8. The New York State Department of Social Services submits quarterly to the Department of Health, Education and Welfare a report detailing the nature and amount of such claims.

9. The Department of Health, Education and Welfare reimburses federally qualified claims at the rate of fifty cents on each dollar paid by the State of New York.

10. At all times material herein MAX KAVALER, the defendant, was licensed by the State of New York as a chiropractor and certified by the City of New York as a medicaid provider.

11. At all times material herein MAX KAVALER, the defendant, was an owner or had a financial interest in or was affiliated with the following medical office and clinics, 91-24 160th Street, Jamaica, New York; Corona Medical Center, 105-05 Northern Boulevard, Corona, New York; and Caller Medical Center, 340 Flushing Avenue, Brooklyn, New York. The business of said office and clinics was to provide health-care services to Medicaid-eligible patients.

M-1310

COUNT ONE

The Grand Jury further charges:

12. From on or about January 1, 1969, up to and including December 31, 1972, in the Southern District of New York and elsewhere, MAX KAVALER, the defendant, and Joseph Howard Ingber and Sheldon Max Styles, named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with persons to the Grand Jury known and unknown, to defraud the United States and its departments and agencies in connection with the performance of their lawful governmental functions by obstructing and hindering the Department of Health, Education and Welfare in administering the Medicaid Act and to violate Title 18, United States Code, Sections 287, 1001, and 1341.

13. It was a part of said conspiracy that the defendant and his co-conspirators would and did agree to defraud the United States of its lawful right to have the United States Department of Health, Education and Welfare reimburse the State of New York as provided in the Medicaid Act fairly and impartially, without undue influence, unlawful inducement, false representation, favor or fraud, by causing the State of New York to file claims for reimbursement under said Medicaid Act which were based in part upon Invoices for Doctor's Services and other documents, which were false, fictitious and fraudulent in material respects.

14. It was further a part of said conspiracy that the defendant and his co-conspirators unlawfully, wilfully and knowingly would and did make and cause to be made false claims upon and against the Department of Health, Education and Welfare, an agency and department of the United States.

M-1316

15. It was further a part said conspiracy that the defendant and his co-conspirators, in matters within the jurisdiction of a department and agency of the United States, that is, the United States Department of Health, Education and Welfare, unlawfully, wilfully and knowingly would and did falsify, conceal and cover up, and would and did cause to be falsified, concealed and covered up by trick, scheme and device material facts and would and did make and use and cause to be made and used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries.

16. It was further a part of said conspiracy that the defendant and his co-conspirators unlawfully, wilfully and knowingly would and did devise a scheme and artifice to defraud the City of New York, the State of New York and the United States Department of Health, Education and Welfare and to obtain money by false, fictitious and fraudulent pretenses and representations and for the purpose of executing said scheme would and did place and cause to be placed certain documents in authorized depositiories for mail and caused them to be delivered to the Department of Social Services of the City of New York and elsewhere.

17. Among the various means whereby the defendant and his co-conspirators would and did carry out the objects of said conspiracy were the following:

(a) Defendant and his co-conspirators would and did employ various medicaid providers including medical doctors (both general practioners and specialists), chiropractors, optometrists, dentists, and podiatrists to work in said clinics.

(b) Defendant and his co-conspirators, would and did encourage the Medicaid providers to factor their Medicaid Invoices for Doctors Services.

(c) The factor would charge the Medicaid providers between 10% and 12% for his services. A percentage of the factor's fee would be kicked back to defendant's co-conspirators.

(d) Said Medicaid providers would and did pay from 10% to 75% of the proceeds received from the factor to the clinics and to the defendant and his co-conspirators.

(e) When a patient would appear at a clinic, his or her Medicaid identification card would be photocopied, a file begun and the names and ages of all Medicaid-eligible family members would be recorded.

(f) Defendant and his co-conspirators would and did cause many patients to see other Medicaid providers in the clinic without regard to the patient's actual health needs.

(g) Defendant and his co-conspirators would and did take and cause to be taken as many blood samples as possible from clinic patients without regard to medical necessity. Said blood samples were sent to a medical laboratory for analysis. The laboratory would and did bill Medicaid for each test performed and would and did kick back from 18% to 22% of such gross receipts to defendant's co-conspirators. In addition, said laboratory would be required to pay in whole or part salaries of some of the employees who worked in said clinics.

(h) Defendant and his co-conspirators in many instances would and did see and cause to be seen each patient regardless of his actual health need and prepare and cause to be prepared Invoices for Doctor's Services.

(i) Defendant and his co-conspirators in many instances would and did add and cause to be added to Invoices for Doctor's Services additional fictitious visits and treatments to actual visits and treatments.

(j) Defendant and his co-conspirators in many instances would and did prepare and cause to be prepared Invoices for Doctor's Services for patients never actually seen or treated.

(k) Defendant and his co-conspirators would and did prepare and cause to be prepared false, fictitious and fraudulent Chiropractic Treatment Plans for patients who were either never seen or diagnosed or did not require the proposed treatment detailed therein.

(l) Defendant and his co-conspirators would and did submit and cause to be submitted and did mail and cause to be mailed said Invoices for Doctor's Services and Chiropractic Treatment Plans to the Department of Social Services of the City of New York, which would then pay the amount claimed in said invoices. The proceeds of these claims were then shared among defendant and his co-conspirators.

OVERT ACTS

In furtherance of the said conspiracy and to effect the objects thereof, the defendant and his co-conspirators committed the following overt acts, among others, in the Southern District of New York and elsewhere:

1. During 1971, MAX KAVALER had a conversation with another about Medicaid Invoices.

2. During 1971, MAX KAVALER and others prepared and caused to be prepared diverse false and fraudulent Medicaid Invoices for Doctor's Services, and Treatment Plans and submitted and caused them to be submitted for payment and approval, as the case may be, to an office of the New York City Department of Social Services, 330 West 34th Street, New York, New York.

(Title 18, United States Code, Section 371)

M-1316

COUNTS TWO THROUGH FOURTEEN

The Grand Jury further charges:

18. That on or about the dates set forth below, MAX KAVALER the defendant, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly, engaged in a scheme and artifice to defraud the City of New York, the State of New York and the United States, whereby they would obtain money by false, fictitious and fraudulent pretenses and representations. Said scheme is fully set forth in paragraphs 1 through 11 and 17 of this indictment which are repeated and realleged as if fully set forth herein.

19. That on or about the dates set forth below, in execution of the aforesaid scheme and artifice to defraud, in the Southern District of New York, MAX KAVALER the defendant, unlawfully, wilfully and knowingly did make and present, and cause to be made and presented to the United States Department of Health, Education and Welfare, a department and agency of the United States, for payment, certain claims upon and against the United States, to wit, various "Invoices for Doctor's Services", which invoices contained certification that the services described therein were furnished by him at certain times to certain Medicaid patients when in truth and in fact, as the defendant, MAX KAVALER then and there well knew said claims were false, fictitious and fraudulent in that some or all of the said services were not furnished by him.

COUNT	DATE	NAME	INVOICE NUMBER
2	3/31/71	Beatrice Lee	M272614
3	3/31/71	Jose Reyes	M272626
4	3/31/71	Willie Walker	M272623
5	5/25/72	Alberta Harris	M272648
6	9/6/72	Alberta Harris	M272699
7	5/25/72	Lillian Velasquez	M272654
8	7/13/72	Celeste Manley	M272679
9	8/16/72	Rosa Rodriguez	Y485813
10	8/16/72	Herman Pas	Y485810
11	8/16/72	Alice Rodriguez	Y485805
12	7/13/72	Gerda Muniz	M272690
13	8/16/72	Nilda Cordero	Y483808
14	9/6/72	Nelly Celange	Y485821

(Title 18, United States Code, Sections 287 and 2).

COUNTS FIFTEEN THROUGH TWENTY-SEVEN

The Grand Jury further charges:

20. That on or about the dates set forth below, MAX KAVALER the defendant, unlawfully, wilfully and knowingly, engaged in a scheme and artifice to defraud the City of New York, the State of New York and the United States, whereby he would obtain money by false, fictitious and fraudulent pretenses and representations.

21. That on or about the dates set forth below, in execution of the aforesaid scheme and artifice to defraud, in the Southern District of New York, MAX KAVALER the defendant, unlawfully, wilfully and knowingly did make and present, and cause to be made and presented to the United States Department of Health, Education and Welfare, a department and agency of the United States, for payment, certain claims upon and against the United States, to wit, various "Invoices for Doctor's Services", which invoices contained certification that the

services described therein were furnished by him at certain times to certain Medicaid patients when in truth and in fact, as the defendant, MAX KAVALER then and there well knew said claims were false, fictitious and fraudulent in that some or all of the said services were not furnished.

COUNT	DATE	NAME	INVOICE NUMBER
15	3/31/71	Rosa Echevarria	K890324
16	3/31/71	Maria Colon	K890326
17	3/31/71	Sheila Einhorn	K890323
18	3/31/71	Minerva Rodriguez	K890316
19	3/31/71	Rachel Espinosa	K890322
20	3/31/71	Yolanda Rodriguez	K390332
21	3/31/71	Luz Quinones	K390333
22	3/31/71	Jasmin Arroyo	K890327
23	3/31/71	Celinda Mattias	K890320
24	5/7/71	Elisa Ruiz	K890359
25	5/7/71	Lucilda Creque	K890362
26	5/7/71	Ada Torres	K890356
27	5/7/71	Carmen Irizarry	K890360

(Title 18, United States Code, Sections 287 and 2).

COUNTS TWENTY-EIGHT THROUGH FIFTY-THREE

The Grand Jury further charges:

22. That on or about the dates set forth below, in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, to wit: the United States Department of Health, Education and Welfare, MAX KAVALER, the defendant, unlawfully, wilfully and knowingly did falsify, conceal and cover up, and cause to be falsified, concealed and covered up, by trick, scheme and device, material facts, and did make and cause to be made false, fictitious and fraudulent statements and representations and did make and cause to be made and did use and cause to be used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries, in that the defendant, MAX KAVALER, submitted and caused to be submitted to the United States Department of Health, Education and Welfare various false and fraudulent statements which were based in part upon Treatment Plans and Invoices for Doctor's Services in which defendant certified and caused to be certified that medical services had been furnished by him to the medicaid patients listed therein, when, in truth and in fact, as the defendant then and there well knew, said certifications were false in that the claimed medical services had not been rendered.

COUNT	DATE	NAME	INVOICE NUMBER
28	3/31/71	Beatrice Lee	M272614
29	3/31/71	Jose Reyes	M272620
30	3/31/71	Willie Walker	M272623
31	5/25/72	Alberta Harris	M272648
32	9/6/72	Alberta Harris	M272699
33	5/25/72	Lillian Velasquez	M272654
34	7/13/72	Celeste Manley	M272679

COUNT	DATE	NAME	INVOICE NUMBER
35	8/16/72	Rosa Rodriguez	Y485813
36	8/16/72	Herman Pas	Y485810
37	8/16/72	Alice Rodriguez	Y485805
38	7/13/72	Gerda Muniz	M272690
39	8/16/72	Nilda Cordero	Y483808
40	9/6/72	Nelly Celange	Y485821
41	3/31/71	Rosa Echevarria	K890324
42	3/31/71	Maria Colon	K890326
43	3/31/71	Sheila Einhorn	K890323
44	3/31/71	Minerva Rodriguez	K890316
45	3/31/71	Rachel Espinosa	K890322
46	3/31/71	Yolanda Rodriguez	K890332
47	3/31/71	Luz Quinones	K890333
48	3/31/71	Jasmin Arroyo	K890327
49	3/31/71	Celinda Mattias	K890320
50	5/7/71	Elisa Ruiz	K890359
51	5/7/71	Lucilda Creque	K890362
52	5/7/71	Ada Torres	K890356
53	5/7/71	Carmen Irizarry	K890360

(Title 18, United States Code, Sections 1001 and 2.)

Foreman

ROBERT B. FISKE, JR.
United States Attorney

Form No. USA-33s-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

MAX HAYLE,

16

Defendant.

INDICTMENT

In violation of Title 18, United States Code, Sections 371 287 and 2.

ROBERT B. FISKE, JR.
United States Attorney.

A TRUE BILL

Foreman

FII—SS—2-19-71—COM—6050

MAR 11 1976

APR 9 1976

JUL 19 1976

JUL 20 1976

JUL 21 1976

JUL 22 1976

JUL 23 1976

JUL 27 1976

JUL 28 1976

JUL 29 1976

x indictment. (Conway, J.

t. (Atty. Timothy B Singer)
Defft plead not guilty. R.O.A.

Suppression Hrng. began. & concluded.
Motion denied.

t (Atty. Wm. Esbitt) Jury trial (Breant, J.

gun

al Cont'd.

al Cont'd.

al Cont'd.

al Cont'd. Court grants
motion ~~to dismiss~~ for judgment of
quittal on cts 3, 4, 7, 8, 12, 13, 14, 17, 20, 23,
24, 29, 30, 33, 34, 38, 39, 41, 43, 46, 49 & 50.

al Cont'd. cts. 23, 31, 33, 35, 36, 37, 41, 42, &
al Cont'd ~~motion~~ motion for judgment of
acquittal is denied as to
all counts of the Indictment
on July 27, 1976

al Cont'd

al Cont'd + Concluded. Jury retires

ft. guilty on Cts. 1, 2, 5, 6, 9, 10, 11, 15, 16, 18,
21, 22, 26 and 27.

Not Guilty on Counts 12 and 25. P.S.I.
ordered. Sentence set for 9/17/76. Cont'd

Breant, J.

9/29/16 Dept (cattle grazing)

A 18 — JUDGE BRIEANT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA : 76 CRIM. 0110

- v - : INDICTMENT

MAX KAVALER, : 76 Cr.

Defendant. :

----------x

U.S. DISTRICT COURT FILED JAN 29 1976 S.D. OF N.Y.

The Grand Jury charges:

1. On July 30, 1965, Title XIX of the Social Security Act (the "Medicaid Act") was enacted creating the Medicaid program.

2. Pursuant to the Medicaid Act, the United States Department of Health, Education and Welfare shares with each state the cost of medical services to families with dependent children and to aged, blind, or permanently and totally disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services.

3. The Medicaid program further provides for rehabilitative and other services to help such families and individuals attain or retain capability for independence and self-care.

4. Pursuant to the Medicaid Act each state must promulgate a plan for Medicaid assistance.

5. On May 1, 1966 the State of New York enacted a statewide medical plan in accordance with the provisions of the Medicaid Act.

DOFILM

GEJ:bj
M-1316

6. The New York State Social Welfare Law vests responsibility for the medical assistance program within New York State in the State Department of Social Services.

7. The Department of Social Services of the City of New York, located at 330 West 34th Street in Manhattan, processes and pays claims by various providers for Medicaid services rendered within New York City. The nature and amount of all such claims is reported monthly by New York City to the New York State Department of Social Services.

8. The New York State Department of Social Services submits quarterly to the Department of Health, Education and Welfare a report detailing the nature and amount of such claims.

9. The Department of Health, Education and Welfare reimburses federally qualified claims at the rate of fifty cents on each dollar paid by the State of New York.

10. At all times material herein MAX KAVALER, the defendant, was licensed by the State of New York as a chiropractor and certified by the City of New York as a medicaid provider.

11. At all times material herein MAX KAVALER, the defendant, was an owner or had a financial interest in or was affiliated with the following medical office and clinics, 91-24 168th Street, Jamaica, New York; Corona Medical Center, 105-05 Northern Boulevard, Corona, New York; and Galler Medical Center, 858 Flushing Avenue, Brooklyn, New York. The business of said office and clinics was to provide health-care services to Medical-eligible patients.

Wbj
1316

COUNT ONE

The Grand Jury further charges:

12. From on or about January 1, 1969, up to and including December 31, 1972, in the Southern District of New York and elsewhere, MAX KAVALER, the defendant, and Joseph Howard Ingber and Sheldon Max Styles, named as co-conspirators but not defendants unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with persons to the Grand Jury known and unknown, to defraud the United States and its departments and agencies in connection with the performance of their lawful governmental functions by obstructing and hindering the Department of Health, Education and Welfare in administering the Medicaid Act and to violate Title 18, United States Code, Sections 287, 1001, and 1341.

13. It was a part of said conspiracy that the defendant and his co-conspirators would and did agree to defraud the United States of its lawful right to have the United States Department of Health, Education and Welfare reimburse the State of New York as provided in the Medicaid Act fairly and impartially, without undue influence, unlawful inducement, false representation, favor or fraud, by causing the State of New York to file claims for reimbursement under said Medicaid Act which were based in part upon Invoices for Doctor's Services and other documents, which were false, fictitious and fraudulent in material respects.

14. It was further a part of said conspiracy that the defendant and his co-conspirators unlawfully, wilfully and knowingly would and did make and cause to be made false claims upon and against the Department of Health, Education and Welfare, an agency and department of the United States.

GMJ:bj
M-1316

15. It was further a part said conspiracy that the defendant and his co-conspirators, in matters within the jurisdiction of a department and agency of the United States, that is, the United States Department of Health, Education and Welfare, unlawfully, wilfully and knowingly would and did falsify, conceal and cover up, and would and did cause to be falsified, concealed and covered up by trick, scheme and device material facts and would and did make and use and cause to be made and used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries.

16. It was further a part of said conspiracy that the defendant and his co-conspirators unlawfully, wilfully and knowingly would and did devise a scheme and artifice to defraud the City of New York, the State of New York and the United States Department of Health, Education and Welfare and to obtain money by false, fictitious and fraudulent pretenses and representations and for the purpose of executing said scheme would and did place and cause to be placed certain documents in authorized depositiories for mail and caused them to be delivered to the Department of Social Services of the City of New York and elsewhere.

17. Among the various means whereby the defendant and his co-conspirators would and did carry out the objects of said conspiracy were the following:

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(a) Defendant and his co-conspirators would and did employ various medicaid providers including medical doctors (both general practioners and specialists), chiropractors, optometrists, dentists, and podiatrists to work in said clinics.

(b) Defendant and his co-conspirators, would and did encourage the medicaid providers to factor their Medicaid Invoices for Doctors Services in order to insure prompt payment.

(c) The factor would charge the Medicaid Providers between 10% and 12% for his services. A percentage of the factor's fee would be kicked back to defendant's co-conspirators.

(d) Said Medicaid Providers would and did pay from 10% to 75% of the proceeds, (depending on the type of provider) received from the factor to the clinics and defendant and his co-conspirators for the use of the facilities and the right to practice in the clinics.

(e) When a patient would appear at a clinic, his or her Medicaid identification card would be photocopied, a file begun and the names and ages of all eligible family members would be recorded.

(f) Defendant and his co-conspirators would and did cause many patients to see other Medicaid Providers in the clinic without regard to the actual health needs.

(g) Defendant and his co-conspirators would and did take and cause to be taken as many blood samples as possible from clinic patients without regard to medical necessity. Said blood samples were sent to a medical laboratory for analysis. The laboratory would and did bill Medicaid for each test performed and kickback from 18% to 22% of its gross receipts from Medicaid to defendant's co-conspirators. In addition said laboratory would be required to pay in whole or part salaries of some of the employees who worked in said clinics.

(h) Defendant and his co-conspirators in many instances would and did see and cause to be seen each patient regardless of actual health need and prepare and cause to be prepared Invoices for Doctor's Services.

(i) Defendant and his co-conspirators in many instances would and did add and cause to be added to Invoices for Doctor's Services additional fictitious visits and treatment to actual visits and treatment.

(j) Defendant and his co-conspirators in many instances would and did prepare and cause to be prepared Invoices for Doctor's Services for patients never actually seen or treated.

(k) Defendant and his co-conspirators would and did prepare and cause to be prepared false, fictitious and fraudulent Chiropractor Treatment Plans for patients who were either never seen or diagnosed or did not require the proposed treatment detailed therein.

(l) Defendant and his co-conspirators would and did submit and cause to be submitted and did mail and cause to be mailed said Invoices for Doctor's Services and Chiropractor Treatment Plans to the Department of Social Services of the City of New York, which would then pay the amount claimed in said invoices. The proceeds of these claims were then shared among defendant and his co-conspirators.

OVERT ACTS

In furtherance of the said conspiracy and to effect the objects thereof, the defendant and his co-conspirators committed the following overt acts, among others, in the Southern District of New York and elsewhere:

1. During 1971, MAX KAVALER had a conversation with another about Medicaid invoices.

2. During 1971, MAX KAVALER and others prepared and caused to be prepared diverse false and fraudulent Medicaid Invoices for Doctor's Services, and Treatment Plans and submitted and caused them to be submitted for payment and approval, as the case may be, to an office of the New York City Department of Social Services, 330 West 34th Street, New York, New York.

(Title 18, United States Code, Section 371)

COUNTS TWO THROUGH FIVE

The Grand Jury further charges:

18. That on or about the dates set forth below, MAX KAVALER the defendant, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly, engaged in a scheme and artifice to defraud the City of New York, the State of New York and the United States, whereby they would obtain money by false, fictitious and fraudulent pretenses and representations. Said scheme is fully set forth in paragraphs 1 through 11 and 17 of this indictment which is repeated and realleged as if fully set forth herein.

19. That on or about the date set forth below, in execution of the aforesaid scheme and artifice to defraud, in the Southern District of New York, MAX KAVALER the defendant, unlawfully, wilfully and knowingly did make and present, and cause to be made and presented to the United States Department of Health, Education and Welfare, a department and agency of the United States, for payment, certain claims upon and against the United States, to wit, various "Invoices for Doctor's Services", which invoices contained certification that the services described therein were furnished by him at certain times to certain Medicaid patients when in truth and in fact, as the defendant, MAX KAVALER then and there well knew said claims were false, fictitious and fraudulent in that some or all of the said services were not furnished.

COUNT	DATE	NAME	INVOICE NUMBER
2	3/31/71	Rosa Echevarria	K890324
3	3/31/71	Maria Colon	K890326
4	3/31/71	Beatrice Lee	M272614
5	3/31/71	Carmen Irizarry	K890360

(Title 18, United States Code, Section 287 and 2)

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COUNTS SIX THROUGH ELEVEN

The Grand Jury further charges:

20. That on or about the dates set fourth below, in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, to wit: the United States Department of Health, Education and Welfare, MAX KAVALER, the defendant, unlawfully, wilfully and knowingly did falsify, conceal and cover up, and cause to be falsified, concealed and covered up, by trick, scheme and device, material facts, and did make and cause to be made false, fictitious and fraudulent statements and representations and did make and cause to be made and did use and cause to be used false writings and documents knowing the same to contain false, ficitious and fraudulent statements and entries, in that the defendant, MAX KAVALER, submitted and caused to be submitted to the United States Department of Health, Education and Welfare various false and fraudulent statements which were based in part upon Treatment Plans and Invoices for Doctor's Services in which defendant certified and caused to be certified that medical services were furnished or to be furnished by him to the medicaid patients listed therein, when, in truth and in fact, as the defendant then and there well knew, said certifications were false in that the claimed medical services were not rendered.

COUNT	DATE	NAME	INVOICE NUMBER
6	1/28/71	Beatrice Lee	Treatment Plan
7	2/28/71	Rosa Echevarria	Treatment Plan
8	3/31/71	Rosa Echevarria	K89032.
9	3/31/71	Maria Colon	K890326
10	/31/71	Beatrice Lee	M272614
11	5/7/71	Carmen Irizarry	K890360

(Title 18, United States Code, Sections 1001 and 2.)

Foreman

THOMAS J. CAHILL
United States Attorney

JUDGE BRIEANT

JAN 29 1976 filed in

...District Court

...RICT OF NEW YORK

...TATES OF AMERICA

vs.

Defendant.

...TMENT

...76 Cr.

...on of Title 18,
...es Code, Sections
...d 2, 1001 and 2.)

...S J. CAHILL
United States Attorney.

...Sec'l Atto

Foreman.

...15-71—2031—6950

...: 29 19...

JUDGE BRIEANT

JAN 29 1976 filed in ... Ward

FEB 9 1976 - Counsel present. Deft. pleads not guilty. Assigned to Brieant, J. to h... 10 days for motions. Deft. ROR. Bail forfeited & ...

Motley, J. M

6/14/76 Gov't's oral application to file nolle prosequi is granted.

Brieant, J.

UNITED STATES OF AMERICA
vs.
MAX KAVALER,
Defendant.

76 Cr. 241

New York, July 22, 1976;
10.30 A.M.

Trial resumed.

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(In the courtroom in the absence of the jury.)

THE COURT: Good morning, gentlemen. As soon as you are ready to proceed you may do so.

MR. WILSON: Good morning, your Honor. I have the transcripts, at least a portion of the grand jury transcripts. Enough I think for your Honor to make the determination. I would like to --

THE COURT: Do I understand that you don't propose to bring in the balance of the transcript?

MR. WILSON: Your Honor, I have transcripts which have not been transcribed of a couple of witnesses. However, I have transcripts of the -- both the superseding grand jury proceedings and most of the original grand jury proceedings, which show the warnings which were given to the grand jury. One of the problems with Mr. Esbitt making this untimely motion --

THE COURT: He hasn't even made the motion yet. He told me yesterday he wanted to make one and I said he could.

MR. WILSON: I am not so sure this is the type of motion under 12(b)(1) that he could make at this time. This is the type of motion that should according to the rule mandatorily be made before trial because he is attacking the sufficiency of the indictment. He knew a couple of weeks ago, based on my answers to his questions, that patients had not appeared before the grand jury.

THE COURT: No patients appeared?

MR. WILSON: That is correct. I am a little bit surprised he waits until the middle of the government's case to raise the motion. I had a grand jury reporter on the verge of tears, if not in tears, this morning having her dig out old transcripts and prepare parts of transcripts, and other parts we don't have, of this grand jury proceeding. I have obtained those portions of the grand jury proceeding which I think an examination by your Honor will substantiate our claim that the grand jury was given the warning which is suggested in the Esteppa case and other cases. As a matter of fact. he was given the warning three times.

THE COURT: Let Mr.Esbitt make his motion, and

you may respond briefly.

May I say, gentlemen, our jury are all present, so we ought to proceed diligently.

MR. ESBITT: Yes, your Honor, I will. I would like to submit to your Honor a memorandum on this matter.

THE COURT: Place it on the clerk's desk.

MR. ESBITT: Yes, sir.

Your Honor, on behalf of this defendant I move the Court to dismiss Counts 2 through 53 of this multi-count indictment. Your Honor, I am sure, is aware that on Counts 2 through 53, are counts which involve alleged false invoices. They depend for the proof not only on the invoices themselves, but depend primarily -- and they are stipulated, by the way, we have agreed and Mr. Kavaler has filled them out, signed them, and received payment -- but they depend on the testimony of patients, 26 patients are the patients for these 52 charges.

We submit that the government has not only not had these witnesses before a grand jury, we submit that not only did the government not have sworn statements from these witnesses before they obtained an indictment, we submit that not only did these witnesses not sign any statements before this indictment, but I say to your Honor,and I think it will be unchallenged, that not one

of these witnesses was personally interviewed by Mr. Wilson or Mr. Rosenthal, or the agents in the office. They relied completely upon telephone interviews prior to indictment.

(Continued on next page.)

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THE COURT: You mean some investigator called up a witness such as Arroyo and said did you really have 13 visits and she said she only went a couple of times and that was the end of it.

MR. ESBITT: Yes, sir, in substance. But I will tell your Honor that some of the statements were not even relayed, if they were the persons -- the patients indeed, but someone -- they didn't speak personally to the patient. As to the bulk of these interviews, your Honor has before you a copy of a letter which Mr. Wilson wrote to me, and your Honor has a copy of it. It's a letter dated July 13, 1976, and to give your Honor an idea of the character of the investigation that was conducted by the U. S. Attorney's office and which they obtained an indictment through hearsay evidence, I read to your Honor the second paragraph on the second page of that letter -- and this is Mr. Wilson's letter of July 13:

"I will also provide as 'potential Brady material' copies of our investigator's notes of the patient interviews,

"We do not consider this material as constituting 3500 material as it constitutes neither the verbatim or substantially verbatim statements of any witness, nor were there any of the notes reviewed, documented or

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approved by any witness."

THE COURT: As long as he gave it to you, I don't think it matters whether he correctly or incorrectly argues that it is or is not 3500 material.

MR. ESBITT: I don't raise it for that point, your Honor. But your Honor will see these interview statements at any time in these proceedings as you reach that point, and you will see the quality of the interviews that were conducted on the ttlephone of patients whose testimony was not presented to the grand jury.

THE COURT: Did they have accomplice testimony to the effect that 50 per cent of the bills were fraudulent? Did the grand jury have the accomplice testimony to be heard in this trial?

MR. ESBITT: Yes, sir.

THE COURT: All right. Do you want to respond?

MR. ESBITT: I haven't started my legal argument.

THE COURT: I thought you were relying on United States v. Esteppa.

MR. ESBITT: I do, but I want to discuss the law.

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THE COURT: Very briefly. The jury is waiting. I understood United States v. Estepna and United States v. Umans are the cases in point here, to the extent thatthey are not in conflict with United States v. Costello.

MR. ESBITT: If you just bear with me, I know the jury is waiting. It is an important matter to my client and myself.

THE COURT: It is important, but I don't see how I can rule on it unless I see the grand jury material.

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MR. ESBITT: Then perhaps it would be advisable, if your Honor does see the grand jury material, and then permit me to make the legal argument.

THE COURT: I would be willing to do that. When will you have all the grand jury material on which you are relying, Mr. Wilson?

MR. WILSON: I have it here, your Honor. I think the only portions I am missing relate to other defendants. In January we presented evidence to the December 1974 additional grand jury, which was a special Medicaid fraud grand jury, which was sitting for a year at that time. We presented evidence on five docotrs: Kavaler, Ginzberg, Asher, Uthorn and Mrach.

I have obtained that portion of the grand jury testimony which relates to -- which deals in any way with Dr. Kavaler's case, and in addition to that I have turned over to Mr. Esbitt this 3500 material transcript of the Krieger and Styles grand jury.

I have here what I think is the complete placket for both grand jury proceedings, both the original and the superseder.

THE COURT: This is what you are relying on?

MR. WILSON: Yes, your Honor.

THE COURT: You are willing that the motion be

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decided based on these documents?

MR. WILSON: Yes. The same grand jury sat both times.

THE COURT: On the superseding indictment?

MR. WILSON: That is correct. I have testimony from Dr. Ingber, Styles and Krieger. As a matter of fact, Mr. Esbitt perhaps can give me back the original copies as 3500 material on Ingber and Styles at this time.

MR. ESBITT: After the case is over.

MR. WILSON: No, the witnesses have testified.

MR. ESBITT: I may need it for my summation

THE COURT: If you want to submit it and ask for it back, I think that request could be accommodated. Let it be marked for identification on this motion.

MR. WILSON: Do you want the transcripts marked separately, your Honor?

THE COURT: It makes no difference to me, Mr. Wilson.

MR.WILSON: This will be No. 42 --

THE COURT: Are you getting the transcript?

MR. ESBITT: Yes.

THE COURT: Then what do you need the exhibits for that didn't go in evidence?

MR. ESBITT: Your Honor, each lawyer has his own way of preparing a summation.

MR. WILSON: I object to Mr. Esbitt arguing from what is not in evidence.

MR. ESBITT: I know better than that, Mr. Wilson. I will not make any statement to the jury which is not in evidence, but I believe I have the right in preparing my summation to in my thoughts go over anything --

THE COURT: Don't worry about the right. I am prepared to accommodate you.

MR. WILSON: This will be Exhibit 42A. This is 42B. We have 42C, D, E and F.

(Government's Exhibits 42 through 42F were marked for identification)

MR. ESBITT: May I inquire, your Honor, of Mr. Wilson, in the Court's presence, whether or not your Honor now has in front of you all of the transcribed testimony of the agents who testified in this case with respect to the substantive counts in lieu of the patients themselves?

MR. WILSON: Your Honor, I responded to your direction to hand up all the testimony concerning the Kavaler case. There are four volumes of grand jury

testimony through the investigation which indirectly relates to the conspiracy and I will make those four volumes available.

Mr. Kenner, in his testimony of January 27, has in effect summarized what the grand jury heard for the previous year.

THE COURT: My suggestion is I read these and we will come back to the problem.

MR. WILSON: I will make the other four volumes available if your Honor thinks he needs them on background, but Mr. Kenner's testimony summarizes it for the grand jury.

THE COURT: Is this the last of the defendants extant? Are there any other indictments not tried or not disposed of?

MR. WILSON: Dr. Uthorn has to be retried and Dr. Ginsberg will be tried in September. Dr. Ginsberg has not yet been tried.

MR. ESBITT: Your Honor, I must make my position clear and the reason I must do it is because I was the attorney in the Umans case and I was the one who first brought this issue before the Court, unsuccessfully, as your Honor knows but, however, I noticed in an opinion by Judge Medina, who in one of his dissenting

opinions made reference to the Umans case and said that while certiorari had been granted in the Umans case, they dismissed on the ground that certiorari had been improperly granted, and in the course of Judge Medina's opinion he said perhaps counsel had not properly presented the issue.

Now, that hurts a lawyer, as you know.

THE COURT: He didn't mean you, did he?

MR. ESBITT: Yes, sir.

The reason I made that observation before your Honor this morning is because I believe that I must make the record crystal clear and for that purpose I say to your Honor that I believe, number one, I am entitled to see the grand jury testimony of these agents whose testimony the government asked the grand jury to rely on in lieu of live witnesses.

THE COURT: After I inspect it in camera I will determine whether you should seeit or not.

MR. ESBITT: Number two, I believe I am entitled to a hearing outside the presence of the jury to determine what that witness said and on what he based the statements that he made to the grand jury which resulted in 52 counts.

THE COURT: I will reserve on this request

until after I have read the grand jury testimony in camera.

MR. ESBITT: Then I trust, if it is necessary, I would like an opportunity to argue the point.

THE COURT: Certainly. It is merely a matter of scheduling. I am entirely willing to hear you, but you must understand themotion doesn't pertain to count 1.

MR. ESBITT: I agree, not yet.

THE COURT: I don't like to spend all my time criticizing the prosecutors but count 1 is the essential part of this case and without count 1 these other things could be trivial matters.

MR. ESBITT: Except I must say this, as I said to your Honor at the conclusion yesterday afternoon, in my objection to that witness, if counsel now proceeds to put on the substantive count witnesses on the witness stand, a series of them, and then if your Honor decides my motion, the jury will have been prejudiced bythe testimony of substantive witnesses.

THE COURT: You would be no differently situated than if the Court granted your rule 29A motion on some of these substantive counts at the close of the government's case, which I may have to do, which it may be appropriate for me to do.

MR. ESBITT: Except that I am making the application now to avoid having those witnesses testify when it is not necessary.

(Continued on next page)

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THE COURT: I believe, as a matter of discretion, under the entire circumstances of this case, that it is appropriate for me to continue the trial while I am reading the grand jury minutes in camera. I do not believe you are barred from making your motion, but I do think the apparent desirability of the motion was a factor in this case probably before we began the trial and I also have to remind you that in the famous Esteppa case, in reliance on Ball, they said you could go right ahead and reindict Esteppa and try him again,which in fact happened. So there is no jeopardy problem, with respect to the Esteppa motion.

MR. ESBITT: No jeopardy to whom, the government or my client?

THE COURT: I perhaps expressed it too briefly.

MR. ESBITT: I am sorry, I withdraw that comment.

THE COURT: A mistrial granted on Esteppa grounds, under the Esteppa decision itself, would not give rise to a claim of double jeopardy when they return a new indictment after they brought in all these ladies who didn't get treated.

MR. WILSON: May I be heard in opposition to this?

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THE COURT: Can't you be heard later?

MR. WILSON: No, your Honor. First of all, I am a little bit dismayed at Mr.Esbitt's failure to make this motion pretrial. Now, at the very latest, according to his represaentations, he knew about it on July 13.

THE COURT: If the motion has merit, I won't be dismayed about that. I think that is a factor, however, in my exercise of discretion to continue taking proof in this trial at this time. That is all that I am relying on that for. I am not regarding this defendant as barred by any failure to have made the motion earlier. In Esteppa they didn't make the motion until after the judgment of conviction had been entered.

MR. ESBITT: I agree, Judge.

MR. WILSON: Your Honor, I am not agreeing with Mr. Esbitt's representations as to how these witnesses were interviewed.

THE COURT: As the witnesses testify, he will probably ask them that.

MR. WILSON: I am sure he will. I can't think of any precedent that requires the government to get sworn statements --

THE COURT: Please, can't we continue the trial?

AFTERNOON SESSION
2:25 p.m.

(In open court; jury absent)

MR. ESBITT: May I proceed, your Honor?

THE COURT: Yes, please, Mr. Esbitt.

MR. ESBITT: If your Honor please, I have during the lunch hour had an opportunity to read briefly Government's Exhibits 42, 42A, 42F and 42B, which I understand substitutes the suggested testimony of government agents who testified in lieu of the patients themselves coming to testify with respect to indictment counts 2 through 53, and I should like to direct my attention to those counts and which I ask your Honor to dismiss.

I must, of necessity, go through this testimony in detail, but I don't think it is too extensive.

Government's Exhibit 42, which is the grand jury testimony of Charles H. Kerner, my reading of it fails to disclose that any information was given to the grand jury by Mr. Kenher with respect to these substantive counts, and if I am wrong, I trust Mr. Wilson --

THE COURT: Wouldyou hand that exhibit back to the clerk for a moment, please?

MR. ESBITT: Yes, sir (handing).

(Pause)

THE COURT: I take it it is conceded that in that particular exhibit they don't name any particular patient by name, is that right?

MR. ESBITT: I don't see any reference, your Honor.

MR. WILSON: I don't have a copy, your Honor. If that is the earlier testimony, I think that is correct, your Honor.

THE COURT: That is the testimony on January 22.

You may proceed.

MR. ESBITT: Now, directing your Honor's attention to Governments' Exhibit 42A, which is the grand jury testimony conducted on January 29, 1976 and conducted by Mr. George Wilson, Assistant United States Attorney, and that transcript covers 13 pages, and is also the grand jury testimony of Mr. Kenher, but in the first eight and a half pages there is no reference to Dr. Kavaler that I find.

Again, if I am in error, I am sure Mr. Wilson will correct me.

MR. WILSON: The absence of me speaking doesn't mean I agree.

THE COURT: The document speaks for itself.

MR. WILSON: I don't have a copy before me, your Honor.

THE COURT: Neither do I.

MR. ESBITT: Starting on page 9 of that testimony, on January 29, of Mr. Kenher, we find a reference to the first time in this material to Dr. Kavaler and I must of necessity read a short portion of it --

MR. WILSON: I object to that, your Honor.

THE COURT: I will permit a brief part of it to be read for purposes of argument, but the exhibit is before me on this motion and part of my record. Yoj may read briefly from it.

MR. ESBITT: Let me summarize it, your Honor, if I may.

For the first time, on page 9, an exhibit has been shown to the witness by Mr. Wilson and it apparently consisted of invoices and treatment plans which appear to be signed by Dr.Kavaler. The question asked:

"Q Were some patients treated by Dr.Kavaler interviewed?

"A Yes, they were.

"Q Rosalinda Mendez, is it a fact that Dr. Kavaler's invoices show three visits?"

Let me withdraw that a moment. Rosalinda Mendez is not one of the patients named in Dr. Kavaler's proposed indictment, and I will skip the rest because it is no longer significant.

MR. WILSON: That is the indictment which has been superseded, your Honor.

THE COURT: I don't have a copy of the superseded indictment before me at the moment but I don't know if that is necessary.

MR. ESBITT: Mr. Wilson asked the witness about a Rosa Echevarria, was she treated, and the answer was:

"A I believe it was the practice on Lee Avenue."

There is no reference in the record that I see with respect to Rosa Echevarria that this invoice was false and I find no record, as of this point, of any interview about Rosa Echevarria.

THE COURT: Isn't her's in the other investigator's testimony?

MR. ESBITT: Not yet, sir. I will come to it, but notyet.

Mr. Wilson asks Mr. Kenher:

"Q Another interview with Carmen Irizarry,"

and this is important, your Honor:

"A Another interview with Carmen Irizarry.

"Q Is it a fact that she testified,"

and I emphasize the word "testified" that she went to the Lee Avenue Clinic and saw one chiropractor there about five or six times?

"A She said she saw two chiropractors there for a total of about five or six times."

THE COURT: Would you explain that, Mr. Wilson? What does it mean by "testify"?

MR. WILSON: I don't have the document in front of me --

THE COURT: Why don't you take a look at it. Did she testify in some other case?

MR. WILSON: No, your Honor, I think part of that was used in the broadest sense, that she was interviewed.

THE COURT: Interviews are not testimony. Did they use the word "testify" all through that?

MR. [illegible]BITT: There are other references to a witness presumably testifying, but I will get to that in due time, your Honor.

MR. WILSON: Rosalinda Mendez, which date was she interviewed, was she treated, was she treated, was she treated --

THE COURT: I think you better give the exhibit back to counsel and let him finish his presentation.

MR. WILSON: I used the word "testify" on a couple of occasions in that exhibit but I think it was qualified by the caveat which I am sure Mr. Esbitt is going to read --

MR. ESBITT: I will read your caveat, believe me.

THE COURT: I don't know how you can ask a leading question in the grand jury to the effect did somebody testify such and such.

MR. WILSON: Assuming this has a defect on the indictment, I didn't understand this motion to be to reevaluate the weight and admissibility of the evidence before the grand jury. I understood this motion to be whether or not the government advised the grand jury under its obligation that they are receiving hearsay. I was not prepared to justify every scrap of evidence.

Moreover, this relates to a superseded indictment and if Mr. Esbitt wanst to address himself to the

nature and substance of the testimony --

THE COURT: Didn't you tell me earlier it was the same grand jury that gave the superseding indictment?

MR. WILSON: That is correct, your Honor.

THE COURT: I would assume they were relying on everything they had heard, from t he beginning of time, including the four volumes you keep telling me about?

MR. WILSON: That is correct, your Honor.

MR. ESBITT: Let me make the record crystal clear, if I may use that cliche: These wintesses, as we know, ever appeared before the grand jury, not one of them. That is stipulated on the record.

These witnesses, as we know, never appeared before the grand jury, not one of them. That is stipulated on the record. These witnesses, not one of them swore to their statements before they took the witness stand or signed a statement, and, more important than that, the interviews that were had were telephone interviews and in some cases not even with the people themselves and --

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MR. WILSON: I object to that. Telephone interviews in some cases not with the people themselves? I request a showing on that.

MR. ESBITT: I am prepared to conduct a hearing on that, your Honor.

THE COURT: I am not prepared to do that but I want you to specify which persons were telephoned.

MR. ESBITT: Mr. Reyes never spoke to the interviewer.

THE COURT: Which count is that?

MR. WILSON: Mr. Reyes will be dropped as soon as we announce which counts we are dropping.

MR. ESBITT: The Judge asked me which ones and I represent to the Court --

THE COURT: Reyes is going out anyway. are there any where the people who testified here today -- that they were not even telephoned?

MR. ESBITT: No, Judge. I do call your Honor's attention once again to Mr Wilson's letter in which he refers to these interviews and I would like to offer for your Honor's consideration the interviews themselves. May I collect them all together and give them to your Honor at the conclusion of this hearing?

THE COURT: Why don't you hand me a couple now.

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I assume they all follow a pattern. Give me the worst one and I will look at that.

MR. ESBITT: I don't have to characterize them any better than Mr. Wilson did in his letter of July 13th. He said they were neither verbatim, or substantially verbatim, statements of any witnesses nor were they approved by any witness --

THE COURT: I don't understand thepoint you are making. The testimony of most of these witnesses who have been called if believed is to the extent that false invoices were filed with respect to them and that they did not receive the treatment in the full amount set forth on the invoices.

MR. ESBITT: Perhaps I didn't make my point clear in my memorandum of law. My motion is not directed to what testimony appeared at this trial --

THE COURT: Which memorandum is this now?

MR.ESBITT: The first one I gave you the other day, your Honor, and I will address myself to that now. The point of the Estepa and Umans case -- it is more than a thrust, your Honor, it is a directive from the Court of Appeals, a directive to the United States Attorneys of the Southern District of New York and the Eastern District of New York, and the District of Connecticut, and I suppose, in a sense, I am responsible for it because I was the attorney

in the Umans case and I raised the issue in that case and when witnesses, in the Umans case took the witness stand and I asked under cross examination "Did you testify before th grand jury," they all said no, and then I addressed myself to Judge Murphy and said "Judge, I think you ought to look at the grand jury testimony as to what sort of testimony the grand jury got to justify an indictment" and Judge Murphy look down at me and said "Mr. Esbitt, Costello, Costello, you know we can have hearsay evidence" and we took it up on appeal and on the appeal, your Honor, we found out for the first time what happened before the grand jury and we understood why: The government did not want these witnesses to testify before the grand jury because they didn't want to place in the hands of defense counsel the testimony of witnesses before a grand jury and therefore denied us that opportunity of cross examination, which was important.

THE COURT: At that time of the Umans case had the section been amended to include grand jury testimony?

MR. ESBITT: No.

THE COURT: I don't think so. That is a recent amendment to 3500, as I recall it. Originally you didn't have to give over the grand jury testimony.

MR. ESBITT: But when a witness takes the

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witness stand I was entitled to it at that point.

THE COURT: Not until later.

MR. ESBITT: No, sir, at that point. That is why I demanded it. When it went up on appeal, your Honor, we found out why the government -- we found out for the first time what happened: The witnesses did not testify but the government had affidavics.

These were bribery payments to revenue agents and we found out on the government appeal that what had happened was an agent, a revenue agent, testified before the grand jury and summarized it afterwards.

We lost in the Court of Appeals, but I was in the Court of Appeals in this courthouse and Judge Lumbard, who was my U.S. Attroeny, when the question was raised, turned to the assistant and said -- I don't remember his name -- "Mr. Assistant, why ddn't you put these witnesses before the grand jury?"

And there was no answer, there couldn't be any answer, we knew why. So he excoriated that Assistant United States Attorney and in a unanimous opinion, while they affirmed the conviction, they said this, and this is significant because this is the law of this circuit today, page 730 of that Court of Appeals decision in the Umans case, "Excessive use of hearsay in the presentation of govern-

ment cases tends to destroy the historical function of grand jury in assessing the likelihood of prosecutorial successes and tends to destroy the protection from unwarranted prosecution that grand juries are supposed to afford to the innocent" and then they said this, and this is signfiicant "Hearsay evidence should only be used when direct evidence is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge" and I say to your Honor that in this case the government had no right to deny this direct testimony to the grand jury unless they had with Judge Friendly has referred to on a number of occasions as an ulterior motive.

THE COURT: They didn't deny it to the grand jury, they told them if he wanted it they could have and identified it on more than one occasion as hearsay. You know, these are poor people, hardworking people, and those who don't work, they don't work, I assume, because they are incapable of working and they have their children and their lives to lead and it is not easy to go troubling them around for grand jury appearances. Here you have a total of about 25 or 26 counts and all those people are not available to the government even today. They can't drag in everybody to tell what they already told the investigator over the phone.

If the grand jurors had said "We want to see Mrs. Irizarry," she would have had to come in with the interpreter and testify --

MR. ESBITT: WE are talking about a defendant whose was indicted on 52 counts on interviews which Mr. Wilson has said are worthless in his letter to me.

MR. WILSON: I object to that characterization.

THE COURT: He said they were not verbatim, that is what he said.

MR. WILSON. Has that letter been marked, your Honor, as part of the evidence?

THE COURT: I don't think so. Maybe you should mark it.

MR. ESBITT: I would be delighted to, your Honor.

THE COURT: Mark it for identification.

MR. ESBITT: I have a lined copy, your Honor.

MR. WILSON: I have no objection to submitting that copy.

THE COURT: Mark it for identification.

(Defendant's Exhibit N was marked for identification.)

MR. WILSON: I have no objection to it being admitted.

THE COURT: It will not be admitted and the jury

will not see it.

MR. WILSON: I mean for this hearing, your Honor.

MR. ESBITT: What happened after the Umans case is we have a number of dissenting opinions by the Court of Appeals on the very same issue. My old professor, Judge Medina, then Professor Medina, in the Beltram case, 388 Fed. 2d, 449, decided 1968, he recommended -- he was a minority judge in that opinion and he recommended dismissal because it was obtained by hearsay evidence and criticized the "evil practice" of using before the grand jury only a pripheral witness -- "evil practice," he called it.

Now we come to the Estepa case, and there the Court of Appeals reversed the conviction and Judge Friendly, who had previously written a very strong dissenting opinion and referred to the shoddy evidence presented before a grand jury -- this time they reversed and said "We have been willing to allow ample -- many doubtless think too amply -- latitude as to hearsay and we can not with proper respect for its discharge of our duties content ourselves with another admonition. A reversal may help to translate the assurance of the United States in the practice."

In the records of my Umans case, in the Supreme Court of the United States there was submitted and I have it

as an exhibit to my memorandum of law, to the Supreme Court of the United States, the letter to Thurgood Marshall, Solicitor General, by Robert M. Morgenthau, and I read the last paragraph and it is dated April 21, 1967 "Since the decision of the Second Circuit Court of Appeals in Umans Assistants in this office have been given clear and unequivocal instructions to submit to the grand jury some first-hand testimony of actual witnesses except where serious practical difficulties or obstacles make this impractical," and this same directive was issued by the United States Attorneys for Brooklyn and Connectict and, as far as I know, others.

In this case, your Honor, there are 26 witnesses needed to prove 52 counts. I can't believe that it can be suggested by anyone that noe of the 26 witnesses could not have been produced before the grand jury and, furthermore, not one of those witnesses signed a statement, not one of those witnesses signed a sworn statement and, more than that, your Honor, not one of those witnesses was personally seen by anybody in the United States Attorney's office prior to indictment, as far as I know.

MR. WILSON: Not true. I respectfully object.

THE COURT: What are you objecting to?

MR.WILSON: The evidence has not established that all these people were solely interviewed over the telephone. I am not prepared to say which were or which were not --

THE COURT: I don't recall any were interviewed directly. The difficulty I have with this whole argument is that in addition to this hearsay testimony the grand jury had the benefit of those two fine witnesses -- three of them, Krieger, Styles and Ingber, and their testimony corroborated the validity of these telephone interviews.

So that without talking about these four volumes, which since I have not looked at them I am not making any finding on them, but the grand jury had all the testimony it had, both hearsay and direct, and it had direct testimony of three accomplices, and it might have been four -- didn't they have Martin also?

MR. WILSON: No, I don't think so, your Honor.

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THE COURT: Go ahead, sir.

MR. ESBITT: The other courts have followed the precept of Umans and Estepa, or even before Estepa was decided, and Judge Weinstein would have dismissed the indictment in the Acurri case for the same reason Uma suggested it should be dismissed, but what happened in that case, he said you didn't have to prove prejudice, just prove it was hearsay, but he discovered that the indictment had been obtained prior to Umans and only for that reason did he not dismiss.

THE COURT: That is just dictum, isn't it, pure and simple dictum, "If it weren't for such-and-such, I would do so-and-so"?

MR. ESBITT: The Court of Appeals said, "We repeat, however, the warnings to the prosecutors given in Umans." That is not dicta -- maybe it is, but it is a clear warning.

We have another decision by Judge Tyler, a former distinguished member of this court and now Deputy Attorney General of the United States, but I think what is significant in Judge Tyler's opinion, and he also reaffirmed the Umans doctrine or directive and he also did not reverse because the prosecutor had obtained the indictment before the Umans decision had come down and been effective, but

I think this is most significant, your Honor, and that is the historic function of a grand jury, to act as a shield and barrier between the prosecutor and the public and when this sort of hearsay evidence is presented to them and when the interviews are not sworn to and the persons are not even seen and when an interviewer will get on the telephone and scribble down some notes without even seeing the person, just a telephone interview, and on the basis of that a government agent, such as Mr. Kenner, or anybody else -- the name is unimportant -- appears before the grand jury and makes a statement that they have been interviewed -- I mean testified -- well, that may be a slip of the tongue, and I don't want to hold that against Mr. Wilson, but it creates the impression in that grand jury that this is reliable testimony. Let me submit three as a sample and please pay no attention to the red marks, they are ours your Honor.

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THE COURT: Are there any where he told them there was testimony other than Echevarria? May I see the papers?

MR. ESBITT: Yes, sir. I submit what appears to be a copy of an interview by A. Fernandez on January 29 of Jose Raos.

THE COURT: Do they have 3500 numbers?

MR.ESBITT: No, sir.

MR. WILSON: These were turned over but not designated as 3500 material, and we contend they are not.

MR. ESBITT: The second one is Rachel Espinoza --

THE COURT: It is not necessary to describe them. Put a number on them.

MR. ESBITT: I have 15, 18, 20 of them, your Honor.

THE COURT: I want to know whether there are any others than Echevarria where the Assistant used the word "testified" in the question when he meant to say "stated."

MR. ESBITT: Yes.

THE COURT: All right, Echevarria and who else?

(Defendant's Exhibits O, P and Q marked for identification.)

MR. ESBITT: Your Honor, with respect to Maria Colon, on page 11 of Exhibit 42-A, we have another example in which the witness was asked about a Maria Colon, spelled C-o-l-o-n-e in this transcript, but I think it is C-o-l-on, page 19:

"Q Another witness named Maria Colon, how many times did she testify she saw Dr. Kavaler?

"A She said at the most she saw him three times."

Then the witness goes on to talk about Beatrice

Lee went to a chiropractor and also Rosa Echevarria, but I find nothing in the balance of the record to indicate that these were false invoices or that those particular patients did not see Dr. Kavaler the number of times. I see nothing in the record on that so far.

Here is the interview of Maria Colon and there is no indication on it whether it is a personal interview or a telephone interview.

From my investigation, your Honor, it would appear that if not all, almost all of these patients were investigated through a telephone interview and were never seen.

THE COURT: I will accept that for the purposes of this motion, that all those who testified were interviewed by telephone -- all those who testified in this trial, I mean.

xx (Defendant's Exhibit R marked for identification.)

MR. WILSON: Prior to the grand jury or at all times?

THE COURT: Prior to the first indictment -- prior to the first indictment against Dr. Kavaler, which is superseded by the one we are trying today.

MR. ESBITT: Now, the balance of the record,

your Honor, so far I have made reference to the grand jury testimony and I believe those dates I gave you would appear to be the sole evidence before the grandjury on the first indictment with respect to the substantive counts. I recognize this is the same grand jury, so I would have to assume that they had knowledge of all the facts they heard before and it was not necessary to bring witnesses in again.

Let's see what else there is with respect to these 52 substantive counts. We have in Exhibit 42-F the grand jury testimony of one Rena Morey, dated March 11, 1976, and from the date of that grand jury testimony I would assume this was the basis for the second indictment supplementing what was received for the first indictment.

The testimony of Agent Rena Morey, the question asked of that witness is:

"Q And have you determined" -- this is a questioning by Mr. Rosenthal and I gather it was Mr. Rosenthal who obtained the second indictment --

"Q Have you determined that with respect to Dr. Max Kavaler there are a number of patients and a number of invoices which while there are a number of invoices which are false, fictitious and fraudulent in the respect they reflect visits which did not occur and patients not treated

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by Dr. Kavaler --

"A Yes.

"Mr. Rosenthal: Will you mark this Grand Jury Exhibit 160.

"Q Looking at Grand Jury Exhibit 160, is that a list of the names of patients and the invoice numbers for those people that you have determined based on either interviews or the interviews of other people who have not been seen by Dr. Kavaler the number of times indicated on the invoices?

"A Um.

"Q Let me rephrase that: you have a list in front of you of invoices and patient sheets?

"A Yes.

"Q Those are patients that have been interviewed by you in the United States Attorney's office?

"A Right.

"Q Based on those interviews, have you concluded the invoices listed next to the patients' names are false, fictitious and fraudulent in respect that there are more visits reflected on the invoices than patients actually had?

"A Yes, except with some of them they were not sure as to how many visits there were, just one or two.

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They are sure they did not go as many as the times indicated.

"Q So with respect to all those patients there are more visits reflected than actually occurred?

"A Yes."

Then I would add this statement by Mr. Rosenthal:

"Mr. Rosenthal: Ladies and gentlemen, let me remind you again that portions of Miss Morey's testimony are hearsay in that she is telling what other people declared and if you desire you can subpoena the original declarants, the people who had firsthand knowledge of these matters. On the other hand, you are entitled to consider hearsay in connection with your deliberation."

That, for all practical purposes --

MR. WILSON: May we have the rest of it read?

THE COURT: It is all before me. It is not necessary to read it. I have read it. I am trying to extend courtesies to counsel by not interrupting, but if it is part of my record, there is no need to read it.

MR. ESBITT: The last exhibit is 42-B, which is the testimony of David Kaiser and I must confess -- yes, on January 29, 1976, I find nothing in that referring to Dr. Kavaler at all except the statement by Mr. Wilson at the end of this witness's testimony in which he advised

the jury that Mr. Kenner's testimony was based on hearsay but there is none of his testimony in this part of the transcript.

I should like to submit to your Honor the additional -- I don't have them collected, but I want to submit for your examination the additional interviews and I say again to your Honor --

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THE COURT: I will take them and mark them for identification. But my understanding is that they follow approximately the same pattern of Exhibit Q for identification of Mrs. Espinoza, or P, which is Raos, who is not accounted for in this indictment.

MR. ESBITT: We believe that these are not only telephone int[illegible]s but these people were not seen by the government prior to the indictment being obtained.

THE COURT: I understand that.

MR. ESBITT: If I may refer your Honor again to another recent decision by Judge Zampano in Connecticut in which he pointed out that the Supreme Court had pointed out on several occasions that one purpose of the requirement that an individual being indicted by a grand jury is to place between the prosecutor and accused an indepedent which can evaluate the evidence and determine it based upon reason. Neither depriving the grand jury of its opportunity of evaluating the credibility of witnesses norby bringing prejudicial witnesses before the grand jury by the prosecutor against the accused of his substantial right. Judge Medina has pointed out in the Beltram case the purpose of this is two-fold. One is to give the grand jury an opportunity to evaluate the case and when you

present this type of what Judge Friendly referred to as "shoddy merchandise," you deny that opportunity to the grand jury to find out whether or not these live witnesses are telling the truth and, secondly --

THE COURT: You have to take the whole picture. We have the other three documents. So, you take the shoddy merchandise along with the good,and Styles corroborates the validity of these telephone interviews.

MR. ESBITT: Your, the reverse may be true.

THE COURT: This is not a case of one false invoice This is a case where as nearly as 50 per cent of them were false.

MR. ESBITT: Yes and no, but let me put it this way --

THE COURT: I think we have taken too long on this.

MR. ESBITT: With respect to the substantive counts, you can't use the conspiracy information or testimony before the grand jury to support the substantive counts. The separate charges are separate charges and must stand on their own.

THE COURT: This may be considered by the grand jury as to each count. I am not talking about here.

MR. ESBITT: Your Honor, these individual

invoices are either false or not false. Neither Ingber nor Styles or anyone else can prove they are false or not false. They didn't identify a single invoice before the grand jury.

THE COURT: That is true. But their testimony tends to place the telephone interviews in a different light.

MR. ESBITT: No, sir.

THE COURT: Very briefly, Mr. Wilson. I want to know particularly if there are any that are not mentioned at all in the grand jury, and I want to know about Echevarria and Colon.

MR. WILSON: Your Honor, I asked Mr. Rosenthal and I couldn't put my hand on the exhibit he had marked, that was referred to by Miss Morey. That was a list of all the patiencs which are now named in the indictment. That is marked, I think, Grand Jury No. 160 or 170 in the March transcript. If I said "testified" in the January transcript, whatever the transcript says it was that he said. It was meant in the broadest sense of the word. We certainly did not mean to convey to the grand jury that these people testified in the sense of testifying at a hearing.

THE COURT: In the context of the courthouse,

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certainly, that's what the word means. We have to remember that you are there in the grand jury, and you have no adversary there and there's yourself and the grand jury members, for the most part laymen, and a court reporter. That's all. There you ought to be very meticulous in framing of questions. You say testified in that context, means testified. By that I mean taking an oath and stating something responsible while under oath.

THE COURT: I don't see how you can use the word "testify" there.

MR. WILSON: I don't deny using the word "testify." I disagree with your Honor's strict interpretation of the word. If this was considered some fatale in the grand jury proceeding, it wasn't as bad as the Estepa matter. One, after that particular testimony of Mr. Kenher, the grand jury is given a warning in which Mr. Esbitt could read and they were asked if they wanted a hearing of these witnesses. A week later when Mr. Kenher testified again and Mr. Kaiser testified, at the end of his testimony the grand jury was reminded that Mr. Kenher's testimony was hearsay. Again, they asked to see no witnesses. Now, it didn't end there. In March, the indictment superseded the substantive counts. That is to say, the additional people were added. Moreover, the

testimony in the grand jury again was that all these people were interviewed and the results of those interviews was that the invoices did not -- the invoices reflected --

(Continued on next page.)

THE COURT: Could I see those particular grand jury minutes.

MR. WILSON: Those are March minutes.

MR. ESBITT: I have not seen any part of the record which makes reference --

MR. WILSON: It is 42F. I believe it is up on the bench, your Honor. In any event, this grand jury was warned three times just for that case, Mr. Rosenthal and Miss Neiman would be prepared to testify they were warned many times during the preceding year about the nature of hearsay. After a year of hearing testimony they are particularly aware of it.

THE COURT: I don't have 42F.

MR. ESBITT: The four exhibits I had I gave back tothe Judge.

THE COURT: Whose testimony is that, please?

MR. WILSON: Morey's testimony of March '76. It was a three-page transcript, a very thin transcript.

MR. ESBITT: I thought I gave it back to your Honor.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: I have found it now. It was on

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the clerk's table. Well, I suppose Mrs. Morey is the real basis for this indictment. As it is, I suppose the inartfully framed question or inartisticlaly framed question isn't a direct taint of the current indictment.

MR. ESBITT: May I make one observation and I have said enough, I know. We have talked about hearsay as being objectionable. But I point out to your Honor that in this case you have the testimony of some people who are not testifying that they spoke to the patients but that someone else spoke to their patients. So you have double hearsay,your Honor.

THE COURT: That doesn't seem to be the problem with it. I think I should call your attention, if I may, to United States v. Harrington which the circuit decided after it became aware of the fact that practically every indictment was being attacked on an Estepa grounds. There they explained Estapa, I think; very clearly. I believe this states the law currently. It confirms in part Mr. Esbitt's experience in connection with the Umans case. After explaining the facts of Estepa, the Court of Appeals says as follows:

"Prior to our decision in Estapa we had issued warnings to prosecutors that the grand jury must be made aware of the hearsay character of the evidence presented

to it, so that, if dissatisfied with the initial presentation, it could knowledgeably demand more probative evidence.

"Estepa was thus not intended to modify broadly the rule recognizing the acceptability of hearsay evidence in grand jury proceedings. See Costello vs. U. S. 350 U.S. 359, 76 S.C. Rather, it was intended as manifest warning that it is impermissible tohave law enforcement officers who have no firsthand knowledge of the subject the grand jury is investigating testify as if they possessed that knowledge. Appellant would have us extract from Estepa a requirement that the prosecution has a broad and amorphous duty to appise the grand jury of the quality of all evidence presented to it. Whatever the scope of such a duty, if indeed a duty exists, there seems to be no substantial ground to challenge the prosecutor's presentation here.

"Assuming, arguendo," and then they make an assumption and they say "was sufficient warning to the grand jurors to suggest to them that they seek from further sources evidence concerning Harrington's involvement in the crime."

Then they cite the Payton case. Another couple of matters, I'll mention them very briefly --

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MR.ESBITT: Could I have the citation.

THE COURT: 490 F 2d, 487 -- I'm sorry, 490 was reading.

MR. ESBITT: What page?

THE COURT: It is 490 F 2d 487 of the Second Circuit case later than Estepa.

Then there is the Bertolotti case where they use two different grand juries. Again they cite approval of the Callandra case to the effect that an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate evidence. Then they refer to Estepa but do not apply it.

One more that I will mention since you have mentioned a couple of district court cases in your discussion is the very fine opinion by Judge Bryan, Frederick Van Pelt Bryan -- I beg your pardon.

This is Circuit Court of Appeals decision in which Judge Bryan was sitting by designation in the circuit, 482 F 2d 807, United States v. Ramirez and there, after reviewing the history beginning with Costello, he makes the following statement, "Our examination of the minutes makes it quite plain that the grand jury was not misled into believing it was getting an eyewitness

account."

I then infer thatthe real meaning of the Estepa case is that so long as the grand jury was not misled as to the quality of what they were getting or the fact that they had the right to demand the direct evidence, that the indictment is not amenable to dismissal on that ground.

If it were not for the fact that the superseding indictment in effect was presented on a separate record and, I believe, that the grand jurors were not misled by the inartistic use of the word"testifying"in connection with Echevarria and Colon, I would dismiss those four counts.

But I really believe that the passage of time and the fact that the proceedings in Exhibit 42F for identification took place in March of 1976, just about a little over -- just about -- well, several months at least followi gthe prior indictment. So, I will denv that motion.

Now, I am prepraed to dismiss those counts as to which there was no proof and I'd be pleased if you would state those for me for the record. You want to read them off, Mr. Wilson?

MR. WILSON: The ones that we're dropping?

THE COURT: But you may be heard on it. Let's bring in the jury. There are a number of witnesses outside. They are restless already. I hope the waiting room in the clinic wasn't like that.

(The jury entered the courtroom)

THE COURT: Good afternoon, members of the jury. Call the next witness, please, Mr. Wilson.

MR. WILSON: The government calls Beatrice Lee.

THE COURT: Would you give me the number, please, Mr. Wilson.

MR. WILSON: 2 and 28, your Honor.

B E A T R I C E L E E , called as a witness by the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q Mrs. Lee, directing your attention to 1971, did you live in Brooklyn?

A Yes.

Q At that time were you on Medicaid?

A Yes, I was.

Q Do you have children?

A Yes.

Q What are their ages and thier names?

A Alfred Lee, Jr., he is eight years old and Lisa Sherry Lee, she is nine years old.

Q Do you recall your Medicaid number?

A Yes.

Q Do you have a card to refer to or do you have it?

A I remember it.

Q What is it?

A It's 2671051.

Q Have you always had the same Medicaid number?

A Yes.

Q Have you ever lost your card or lent it to anyone?

A No.

Q Directing your attention now to 1971. Do you recall where you went for medical treatment during that year?

A Yes.

Q Where?

A On Flushing Avenue.

Q In Brooklyn?

A Yes.

Q Do you recall the address?

A No.

Q Did the clinic have a name?

A Gallery or something like that.

Q Pardon me?

A Gallo's or Gallery, something.

Q Canyou spell that for the reporter, what you recall the name to be?

A Goodness, I'm not sure. But it was on Flushing and --

Q What would you go to the clinic for?

A I went to have a test for pregnancy.

Q Did you see other doctors at the clinic?

A Yes.

Q How did you come to see these doctors?

A Someone told me to go in and see another doctor, while I was waiting to see the medical doctor.

Q Who was it, do you recall?

A Must have been the receptionist.

Q Would you tell the jury what happened when you first went in the clinic? How were you received and processed?

A I went into the clinic, I gave my Medicaid card and I was sitting and waiting. So she would say

"While youare waiting would you like to see another doctor, chiropractor or something?"

I said okay, so I went in and saw a doctor.

(Continued on next page)

Q Did you see a chiropractor?

A Yes.

Q Do you recall his name?

A No.

Q Did you speak to that doctor?

A Yes.

Q Do you recall what he looked like?

A No.

Q Do you have any recollection sitting here today of his appearance?

A No.

Q Did he treat you?

A No.

Q Did he do anything?

A He was examining my back.

Q Did he do anything -- what do you mean by "examine"?

A He was, you know, feeling my back and my neck and things.

Q Is that all?

A Yes.

Q Did you see him again?

A No.

Q One time?

A Yes.

Q When you saw this doctor did you complain of anything being wrong with you, any pain or sickness or anything of that nature?

A No.

Q If you recall.

A No.

Q Did you ever complain of right side of the neck pain?

A No.

Q Radiating into your head?

A Excuse me?

Q Right side of the neck pain, radiating into your head, did you ever complain of that?

A No.

Q I show you Exhibit 1 and ask if you seeyour name on that document and your Medicaid number?

A Yes, I see my name.

Q Were you seen on eight occasions by this chiropractor?

A No.

Q In a period of four weeks?

A No.

Q Have you ever been to a chiropractor before in

your life?

A No.

Q Have you ever been to one since?

A No.

Q One time in your life?

A Yes.

MR. WILSON: Your Honor, may I read portions of Exhibits 1 and 1A to the jury?

THE COURT: Yes.

(Mr. Wilson reads to the jury from Government's Exhibits 1 and 1A in evidence)

MR. WILSON: I wonder if I may pass these to the jury one at a time as we go along, your Honor?

THE COURT: Did they already see that?

MR. WILSON: I think they saw it very quickly, your Honor.

THE COURT: During your deliberations you may send out a note through your foreman telling us any exhibit or all the exhibits that you want to look at, members of the jury.

MR. WILSON: Your witness.

CROSS-EXAMINATION

BY MR. ESBITT:

Q Mrs. Lee, did you ever testify before a

federal grand jury?

A Did I ever before?

Q Did you ever testify before a federal grand jury?

MR. WILSON: We will stipulate she did not.

THE COURT: It is stipulated she didn't. Do you accept that?

MR. ESBITT: Yes.

Q Did you ever sign a sworn affidavit for the government?

MR. WILSON: Objection, your Honor, there is no requirement this be done.

THE COURT: Sustained, but don't make speeches before the jury, Mr. Wilson. I will sustain the objection.

Q Did you ever sign a written statement for the government?

A No.

Q When was the first time that the government contacted you in connection with your testimony here today?

A The first time I think was maybe in January or --

Q I am sorry, I didn't hear that.

A The beginning of the year, maybe around in January.

Q January of 1976?

A Yes.

Q Were you contacted by letter or by telephone?

A I think the first time was telephone, if I am not mistaken.

Q Did you speak to someone?

A Yes.

Q Do you know who that person was?

A I don't remember the person, no. I don't remember the name. I know it was a man.

Q Did he identify himself as Mr. Fernandez?

A I don't remember the name.

Q Did you speak to him on the telephone?

A Yes.

MR. WILSON: Objection, asked and answered.

THE COURT: Well, she said she did.

Q On just one occasion?

A No, I spoke with someone on several occasions.

Q The same person?

A I don't know.

Q Was there a time when you came to the United States Attorney's office for a visit?

A Yes.

Q An interview?

A Yes.

Q When was that?

A Maybe three weeks ago, three or four weeks ago.

Q That was the first time, three weeks ago?

A Yes.

THE COURT: The first time you were ver in this building?

THE WITNESS: Yes.

Q You have been to the medical center you described, on Flushing Avenue in Brooklyn, on how many occasions? Just once?

A I have been there more than once.

Q How many times had you been there?

A I have been to that center quite a few times.

Q And in 1971 you were there quite a few times?

A Yes.

Q How many times, do you know?

A Not exactly, because I would go there and take, you know, the kids, my kids.

Q Were you there more than ten times?

A No.

Q Eight times?

A I doubt it.

Q When you say "quite a few times," how many times do you mean?

A I don't know, maybe four, five, six.

Q And you were there in January of 1971, were you not?

A Yes.

Q And you were there in February of 1971, were you?

A Probably, yes.

Q Did you ever go to a doctor outside of the Galler Clinic who you were referred to?

A Yes.

Q A Dr. Sloan?

A I don't remember the name, but I know I went to a doctor that I was referred to.

MR. ESBITT: No further questions.

MR. WILSON: No redirect.

THE COURT: How old are you?

THE WITNESS: 20.

THE COURT: How far did you go in school?

THE WITNESS: I finished 12th grade.

THE COURT: A high school graduate?

THE WITNESS: Yes.

THE COURT: You are excused. Thank you very much.

(Witness excused)

2B MR. WILSON: The government calls Herman Pas.

H E R M A N A. P A S, called as a witness on behalf of the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q Mr. Pas, do you live in Brooklyn?

A I live in Brooklyn.

Q Are you retired?

A Yes, sir.

Q Do you receive Medicaid?

A Yes, this morning.

Q Pardon me?

A This morning I received.

Q You received your card?

A Yes.

Q Have you been on Medicaid for some years now?

A Yes.

Q On Old Age Assistance?

A Yes.

Q Directing your attention to 1972, sir, did you go to any medical clinic at that time?

A Only one medical clinic, in Flushing Avenue.

Q Do you recall the name ofthat clinic?

A Gallery or Galaxie or something.

Q Something with G-a-l?

A Yes.

Q Do you remember your Medicaid number?

A I have it here: 6606340-1.

Q Do you have a Medicaid card from the City?

A No, this is the only one I have, this morning.

Q Have you ever had a different number?

A I beg your pardon?

Q Have you ever had a different number?

A No, only, Medicaire.

Q That is Medicaire?

A Medicaire, Medicaid.

Q Do you have the same number for both?

A No, the Medicaid is a different number.

Q Will you tell me what your Medicaid number is?

A There is no number here (indicating).

Q Would you recognize your number if you saw it on a piece of paper?

A This only Medicaid, the one I pay (indicating).

Q Would you recognize your Medicaid number on a piece of paper if you saw it?

A Yes, I think so.

Q I show you Government's Exhibit 8 and direct your

attention to this space and ask you to read that number to yourself and tell me if that is your Medicaid number.

A This the number, starting with a 5.

Q That is your Medicaid number?

A Yes.

Q Mr. Pas, when did you go to the Galler Clinic? We are talking about 1972 now. When did you go to the Galler Clinic?

A First I go for foot doctor, they take off my nail.

Q Do you remember who he was?

A The doctor limped,with a cane.

Q Did you see any other doctors?

A Then they send me to chiropractors and I say, "Why I go over there?" And they say, "Go Over, make you feel good."

Q Who said that?

A The foot doctor.

Q Did you see the chiropractor?

A I seen this morning.

Q Did you see the chiropractor then?

A Only when they took off my bandage -- oh, chiropractors, yes.

Q At the clinic?

A Clinic, no. Only two time I see chiropractors --

Q At the clinic?

A Clinic, no. Two time I see the chiropractor and then next time different doctor and I don't like it and I don't come no more.

Q You saw the chiropractor three times --

A Two times, one time one doctor and one time another doctor.

Q Do you recognize any of the chiropractors you saw at that clinic as being in the courtroom today?

A It is so long, I don't know.

Q Do you remember his name?

A No. They don't give me a name or anything.

Q Do you remember what he looked like?

A He is a kind of a middleaged man.

Q And you saw him two times?

A Yes, and the other doctor one time.

Q What did the doctor that you saw two times do for you?

A Just run me with a machine, that's all, and he say, "Go in X-ray."

Q Did you get an X-ray?

A Yes. I say, "What is wrong with me, I have nothing wrong," and he say, "Just to make sure you are all

right."

Q You saw him again?

A Yes.

Q What did he do the second time?

A Same thing, just put machine.

Q Did you ever complain to him that you had low back pain?

A No.

Q Did you ever tell him you had neck stiffness?

A I beg your pardon?

Q Did you ever tell him you had a stiff neck?

A No.

Q Did you see this doctor 13 times between May 13, 1972, and August 10, 1972?

A No, exactly three times.

Q Three times?

A Yes.

Q That is two different doctors?

A Yes.

Q One chiropractor saw you twice?

A Yes.

Q And a different chiropractor saw you one time?

A Yes, that's all.

Q Had you ever been to a chiropractor before that

in your life?

A No.

Q Have you ever been to one since?

A No.

MR. WILSON: Your Honor, may I read portions of Exhibits 8 and 8-A to the jury?

THE COURT: Yes.

(Mr. Wilson reads to jury from Government's Exhibits 8 and 8-A in evidence.)

3A CROSS EXAMINATION

BY MR. ESBITT:

Q Mr. Pas, did you ever testify before a grand jury in this courthouse?

A No.

MR. WILSON: I will stipulate he has not.

For Mr. Esbitt's help I will stipulate that none of this witnesses have testified before a grand jury.

THE COURT: If the stipulation is made with certainty, it may be made, to save asking.

Q When was the first time you were contacted by the government, Mr. Pas?

A I never be in the court all my life.

Q Did you receive a letter from the government about coming to court?

A Yes.

Q A letter?

A Yes. This letter here, that's all.

Q May I see it?

THE COURT: Mark it for identification.

xx (Defendant's Exhibit I marked for identification.)

Q Before you received this paper, did you receive any other paper from the government?

A No.

Q A letter?

A No.

Q Telephone call?

A Telephone call, yes.

Q When?

A Oh, about six, seven months ago. So he said don't worry to come. So that's all.

Q When was the next time that you received another phone call from the government after that?

A Only last week. He said don't come 10 o'clock, come 2 o'clock. That's all.

Q In between, no telephone calls?

A No.

Q Did you see Mr. Wilson before today?

A Yes.

Q When?

A July 6.

Q July 6. That was the first time you saw him?

A Yes.

Q You say you don't see the chiropractor in the courtroom; you don't see him?

A No.

Q Are your eyes very good, Mr. Pas?

lp3 Pas-cross

A Yes, my eyes very good. But so long, only two doctor treat me.

MR. ESBITT: Would you stand up, Doctor.

THE WITNESS: That is the doctor. I see him two times.

Q Is that the chiropractor that treated you?

A Yes.

Q Now that you have seen him, you recognize that he was the chiropractor that treated you?

A Yes.

THE COURT: What did the other chiropractor look like?

THE WITNESS: Younger than this gentleman.

Q Did this gentleman, Dr. Kavaler, ever refer to you as Huk?

A Yes. He correct my back.

THE DEFENDANT: He doesn't understand.

MR. WILSON: Objection. I don't know who is conducting the questions here. I hear Dr. Kavaler speaking to his lawyer.

THE COURT: All right. I am going to ask that all discussions at counsel table be conducted in a sufficiently low enough voice so that it won't be audible. If the jury hears anything at counsel table of either side in

this case, put it out of your minds, disregard it.

Q Do you know a Mrs. Mary Brown?

A Yes.

Q Is he a friend of yours?

A We live in the same building. She was the one who bring me to this doctor. She say, "You hurt your foot, come and let's see this doctor."

Q She is the one who referred you to Dr. Galler?

A No, first with the foot doctor.

Q To the clinic?

A Yes, to the foot doctor.

Q Do you remember Dr. Galler calling you Huk?

MR. WILSON: Objection. Assuming facts not in evidence.

THE COURT: Overruled.

MR. WILSON: There is no testimony about Dr. Galler.

MR. ESBITT: I am sorry.

Q Do you remember Dr. Kavaler calling you Huk?

A Huk? What is that? They don't call me Hook or Huk.

Q Hook or Huk?

A No. Why call me Hook?

THE COURT: How old are you, Mr. Pas?

THE WITNESS: 70, going on 71.

THE COURT: What was your occupation before you retired?

THE WITNESS: Waiter.

THE COURT: How far did you go in school?

THE WITNESS: Oh, I finish high school.

Q Do you remember when you went to the Galler Medical Clinic and were treated by Dr. Kavaler, what year?

A I dont remember. So long.

Q You don't remember?

A No.

Q Too far back?

A Yes.

Q You were suffering from arthritis at the time?

A No.

Q No?

A No.

Q Didn't you go to Dr. Galler first and -- Dr. Kalaver first before you went to the foot doctor?

A No, I go to the foot doctor first.

Q And then to Dr. Kalaver?

A Yes.

MR. WILSON: Your Honor, I wonder if we could approach the side bar?

THE COURT: Certainly.

Would you please step over to the blackboard so I can talk to the lawyers?

(Witness steps down.)

(At the side bar.)

THE COURT: Incidentally, before I hear you, I want to say to Mr. Wilson that my minute clerk, who was standing behind me at the time of our prior conference, couldn't hear anything that was said. If he couldn't hear it, I don't have any reason to think the jurors can hear me. However, we will try to keep it down.

MR. WILSON: I realize Mr. Esbitt has problemsn in keeping his voice down, but I object to one, a matter which you have already dealt with, Dr. Kavaler speaking to him and gesticulating to him.

Another one is having counsel ask me for documents in the presence of the jury. I don't know what Mr. Esbitt is going to ask for.

THE COURT: I am willing that Mr. Esbitt ask you silently or quietly. If he wants to lean over your shoulder and ask you for something that the jury can't hear him ask you --

MR. WILSON: I have no objection to that.

THE COURT: I have no problem with that.

MR. WILSON: I have no records, although I have subpoenaed them from Galler, any chiropractic treatment to this patient. All I have is medical records. I have no chiropractic records, and I asked for that.

MR. ESBITT: I understand.

MR. WILSON: And I note that Dr. Kavaler is holding in his hand and pointing out to us entries on what appear to be a 5 x 7 card. I have not seen that card before. I think that is covered by a subpoena if it is indeed alleged chiropractic treatment record of this patient.

THE COURT: Please, Mr. Wilson. Don't waste my

timewith this. If Mr. Esbitt had a chiropractic treatment card of this patient, we would have seen it now. We are wasting time. While we are up here, I think you ought to make a stipulation so you don't have to ask each of these people whether they have been before the grand jury.

MR. ESBITT: We stipulated to that, I stipulated.

THE COURT: As to all these patients?

MR. ESBITT: Yes, sir.

I think I am entitled to a stipulation as to whether or not he has any sworn statements from these witnesses or any signed statements.

THE COURT: Any of those are 3500 material so I don't see where your problem arises. He has to give them to you.

MR. ESBITT: I don't have them.

THE COURT: Then you may infer there are none. Do you want a stipulation?

MR. ESBITT: Yes.

MR. WILSON: I have no objection to the stipulation. I don't want to do it before the jury. He is trying to lay a foundation for his motion which he is entitled to do.

MR.WILSON: I have no objection to stipulat-

ing outside the hearing of the jury.

THE COURT: I would infer he has none, if he gave you none.

MR. ESBITT: Do you have your medical records on this patient?

MR. WILSON: Yes. Don't you have copies?

MR ESBITT: No. I don't think so. Maybe I am wrong.

THE COURT: I think his client has it, but you produced it, Mr. Wilson.

MR. WILSON: I will be glad to, but it would be administratively easier if we both had our copies because I can't refer to them if you are looking at the records.

(End of side bar.)

Q Mr. Pas, did you go to the medical clinic at Galler on a number of occasions?

A I only go one time , see lady doctor.

Q One time?

A One time.

Q When?

A I don't remember when. The same year, but lady doctor, because I had a cold, I want medicine.

Q Did you go to the medical clinic again besides that lady doctor?

A No.

Q You are sure?

A No.

MR. ESBITT: If your Honor please, I offer the medical records in evidence, the medical records of this patient.

MR. WILSON: I object to that. Improper foundation. This witness is not charged with the knowledge.

THE COURT: I will receive it.

MR. WILSON: Your Honor, we do not warrant the accuracy of these documents.

THE COURT: I will sustain the objection in the absence of a proper foundation. Please don't make speeches in frotn of the jury.

Q The only time you were at Galler Medical Clinic was to see a lady doctor?

A Lady doctor.

Q And that is all?

A That is all.

Q Besides the foot doctor?

A Foot doctor.

Q And Dr. Kavaler twice?

A Yes.

Q You saw him twice. Those are the only times

you went to this medical center?

A Right.

Q You are sure of that?

A Yes.

MR. ESBITT: No further questions.

THE COURT: Anything else for Mr. Pas?

MR. WILSON: No redirect.

THE COURT: All right, sir, you are excused.

(Witness excused.)

MR.WILSON: The government calls Alberta Harris.

A L B E R T A H A R R I S, called as a witness by the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q Mrs. Harris, directing your attention to 1972, did you live in Brooklyn at that time?

A Yes, sir, I lived in Brooklyn.

Q Were you on Medicaid?

Q Yes.

Q Do you recall what your number was?

A It is 28787 -- I am not sure of the last figures.

Q Do you want to look at your card to refresh

MR. WILSON: The government calls Rosa Rodriguez.

ROSA RODRIGUEZ, called as a witness on behalf of the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q Miss Rodriguez, directing your attention to 1972, did you live in Brooklyn at that time?

A Yes, I did.

Q Were you employed then?

A Yes, I was.

Q Where did you work?

A Is there any specific -- I mean --

Q Directing your attention to the early part of 1972, did you have a part-time job while you were in school?

A Yes, I did.

Q Where did you work?

A For Galler Medical.

Q What did you do?

A I was a receptionist, I answered the phone, filled out invoices, I saw to it that the files were kept in order, filed properly.

Q Who was your boss?

A Dr. Kavaler.

Q Do you see Dr. Kavaler in court?

A Yes.

Q Would you point him out?

A (Indicating.)

Q You have to describe where he is for the reporter to take it down.

A He is right in front of me.

Q Which table?

A The second table from this one (indicating).

Q Which one of the three gentlemen?

A The middle one.

MR. WILSON: May the record reflect the witness has identified the defendant?

THE COURT: The record may so indicate.

Q Miss Rodriguez, were you also or was your family on Medicaid at that time?

A Yes.

Q Who was the Medicaid card holder in your family?

A My mother,Jacinta Rodriguez.

Q Do you have sisters or brothers?

A Yes.

Q Would you name them, please?

A I have a twin sister, Carmen Rodriguez, and Alice Caro, C-a-r-o --

Q Alice-Caro Rodriguez?

A Yes, and Nellie Rodriguez; two brothers, David Rodriguez and Louis Rodriguez.

Q Do you recall what your mother's Medicaid number was at that time?

A Yes.

Q Would you tell us what it was?

A 2779796-1.

Q Did you begin going to the Galler Clinic -- have you ever been treated at the Galler Medical Center?

A Yes.

Q Was it before or after you started working there?

A Before.

Q How long before, if you know?

A Couple of months maybe.

Q Did you work there full-time or --

A No, I only worked there part-time.

Q How many days a week?

A It varied, sometimes three hours a day, sometimes maybe four. On Saturdays I usually worked from 9 to 12.

Q Were you treated at the clinic from time to time while you worked there?

A Yes.

Q Did you ever receive treatment from Dr. Kavaler?

A Yes.

Q What did he treat you for?

A For a lower back pain.

Q Do you recall how many times he treated you?

A About four times, that I could remember.

Q Well, the best of your recollection?

A Yes.

Q How often did he treat you?

A That I could remember, to the best of my ability, four times.

Q How often, once a week, once a month, once every two days, or what?

A Maybe once every week in a half, two weeks.

Q Did there come a time when you didn't go back for more treatments or didn't ask for more treatments?

A No, there were times that he did make appointments and I never went.

Q Were your sisters, Alice and Carmen, also treated at the clinic?

A Alice was treated at the clinic.

Q What about Carmen?

A By Dr. Kavaler?

Q By anyone.

A Yes, I think so.

Q You all went to that clinic?

A The whole family, yes.

Q Any time someone got sick?

A Yes.

Q I want to show you Exhibits 5 and 5-A and want you to take a look at it. Is that your name on that and Medicaid number?

A All I see is Rodriguez here. Where is Rosa? Oh, yes, this is me.

Q That is you?

A Yes.

Q Were you treated --

MR. WILSON: Well, let me read this to the jury, your Honor.

(Mr. Wilson reads to the jury from Government's Exhibit 5 in evidence and Government's Exhibit 5-A in evidence.)

Q Miss Rodriguez, were you treated 11 times by Dr. Kavaler during this period?

A No.

Q Did there come a time within the past several months when you had a conversation with Dr. Kavaler?

A Yes.

Q Did you talk to him about this case?

A Yes, I did.

(Continued on next page.)

Q What did he say to you and what did you say to him?

A I said to him that I thought he was in trouble.

Q How did you come to meet him?

A Well, my mother had gone to the medical center, she had gotten very sick, and I was called at my job that she had to be rushed to the hospital because she needed some type of medication that the medical center did not have. So I went down to the medical center to see to it that she got to the hospital and while I was there was when I spoke to Dr. Kavaler.

Q Did you tell him anything about anything that happened to you?

A No. All I told him was that I thought he was in trouble and that I had gotten the telegram.

Q From whom?

A From the court, and that --

Q What did he say to you?

A Oh, I also said that I thought I misplaced it, and he offered to give me the telephone. And then he said --

Q Telephone for what?

A To call here, the court.

Q The U. S. Attorney's office?

A Yes.

Q What else did he say to you?

A And he said for me to tell the truth, that if they asked me how many times I had seen them, to say that I didn't remember.

Q What did you say to that?

A Then the ambulance came and I said all right. I just left.

Q Did you remember at that time?

A How many times I had seen him?

Q Yes.

A (No response)

Q Was your recollection then as it is today, that you saw him about four times?

A Just about, yes.

Q So you did remember?

A Yes.

Q And he asked you to tell the authorities that you did not remember?

A Yes.

MR. ESBITT: The witness testified that he asked her to tell the truth.

MR. WILSON: Your witness.

MR. ESBITT: And that is what she testified to, Mr. Wilson.

THE COURT: The jury heard the witness' testimony.

CROSS-EXAMINATION

BY MR. ESBITT:

Q Mrs. Rodriguez, were you ever interviewed or questioned by anyone from Mr. Wilson's office?

A Yes.

Q Before you came here today?

A Yes.

Q Did you not tell them that you had originally gone to Galler for colds?

A Yes. And for physical examination for school.

Q And then Dr. Kavaler asked you what you were doing and he offered you a job, is that true?

A That is true.

Q And you saw Dr. Newfield and Dr. Kavaler, is that not true?

A Yes, that is true.

Q And Dr. Kavaler did treat you for a lower back pain, is that not true?

A That is true.

Q When you were interviewed, do you remember whether you were interviewed on the telephone or were you interviewed in this office? The first interview by the government?

A Interviewed in their office.

Q Not on the telephone?

A No.

Q In this office?

A Not right h-re.

Q No, in the U. S. Attorney's office?

A Yes.

Q Who interviewed you the first time?

A Miss Morey.

Q Mr. or Miss?

A Miss, if I am correct.

Q Miss Morey?

A Yes.

Q She interviewed you in English, did she not?

A Yes, she did.

Q Isn't it a fact that you told her -- do you remember what day it was, or what month?

A It was about two months ago.

Q Isn't it true, Miss Rodriguez, that you told her, Miss Morey, that you could have seen him 11 times?

Didn't you tell her that?

A Yes, I could have seen him --

Q 11 times?

A I worked there. I seen him so many times.

Q You saw him so many times. Hasn't Dr. Kavaler been good to your family when you needed help?

A Yes, very good.

MR. WILSON: Objection to that. That has no relevance to the direct examination.

THE COURT: I will allow it to stand.

Q Hasn't Dr. Kavaler been good to your family when they needed help?

THE COURT: She just answered it, Mr. Esbitt.

MR. ESBITT: She is shaking her head.

A Yes, he was very good to my family.

Q Doesn't he have a very good reputation in the community with people who know him?

MR. WILSON: Objection. That is an improper foundation to ask a question like that.

THE COURT: There is no proper foundation and it's not clear what reputation pertains to. That is the problem we had this morning with those questions. I will sustain the objection to that particular question as not having a proper foundation.

Q In addition to Dr. Kavaler treating you, didn't other doctors at the Caller Medical Center treat you for other conditions?

A Yes.

Q In 1972? True?

A Yes.

MR. ESBITT: I have no further questions.

MR. WILSON: I have redirect examination.

REDIRECT EXAMINATION

BY MR. WILSON:

Q Miss Rodriguez, you testified on cross that you were asked by an investigator for the government if you could have seen the chiropractor 11 times, or Dr. Kavaler 11 times. At the time that investigator was taking notes did she show you the notes or ask you to check them to make sure they were accurate?

MR. ESBITT: If your Honor please, the testimony of the witness has been given.

THE COURT: I understand that, but she may be asked about the notes.

Q Did you ever read anyone's notes and approve them or correct them, making sure they are accurate?

A She asked me --

Q She asked you questions?

A Yes. Before she showed me anything. Then after I had told her what I thought to be right, then she showed me the notes. She showed me an invoice.

Q Wait a minute. Did she show you invoices or notes, which?

A She showed me the invoice that you showed me.

Q This paper here?

A Yes. It was something --

THE COURT: Show it to the witness, Mr. Wilson, and state the number for the record.

MR. WILSON: Exhibits 5 and 5A in evidence, invoice and treatment plan.

A Yes.

Q Are those the two documents that Miss Morey showed you?

A No. Not this one.

Q You didn't see the treatment plan?

A No.

MR. WILSON: Indicating 5A.

Q YOu did see 5?

A This one.

MR. WILSON: Indicating 5.

THE COURT: The top page?

THE WINTESS: The top page I did see.

THE COURT: Exhibit 5.

Q Miss Rodriguez, weer you later interviewed again?

A Yes, I was.

Q And at that time what if anything did you tell the interviewers about the number of chiropractors you saw?

A There was two chiropractors in Galler Medical. Dr. Kavaler and Dr. Newfield.

Q At that time did you tell the interviewer that you had seen both of them a total of 11 times?

A Yes.

Q So it wasn't just Dr. Kavaler 11 times, but it was all chiropractors 11 times?

A Yes.

Q Dr. Kavaler four times --

A And Newfield a couple of times.

Q One last question: Both Mr. Esbitt and I have used the word "seen." When we ask these questions, it's have you been treated, were you actually on the talbe and they did something to you; do you understand? As distinct to see around the office.

A Yes, I was treated.

Q The last question is: How many times were

you actually treated by Dr. Kavaler, as distinguished from seeing him around the office?

A Four times.

MR. WILSON: That is all.

THE COURT: Anything else of the witness?

MR. ESBITT: Yes, sir.

RECROSS EXAMINATION

BY MR. ESBITT:

Q Miss Rodriguez, this goes back to 1972, does it not?

A Yes, it does.

Q That is four years ago. I am going to ask you as you sit in that jury box --

MR. WILSON: Witness chair.

Q -- witness chair under oath, is it not a fact that it's possible that you were treated by Dr. Kavaler at least 11 times in 1972?

A At least six times with the benefit of the doubt, but not 11.

Q Possibly 11?

A No.

Q More than four?

A At least 6, maybe. Four that I can definitely recall.

Q At least six?

A Could have been.

MR. ESBITT: That is all.

MR. WILSON: No further questions.

THE COURT: You are excused.

(Witness excused)

THE COURT: We will take a ten-minute recess at this time, ladies and gentlemen.

(The jury left the courtroom)

(Recess)

THE COURT: Next witness.

MR. WILSON: The government calls Alice Rodriguez.

A L I C E C A R O , called as a witness by the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q Is it Miss Caro or Rodriguez?

A Caro.

Q Are you formerly Rodriguez?

A Yes.

HAMID ALIZADEH, called as a witness on behalf of the government in rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q Dr. Alizadeh, you are the administrator of a Medicaid clinic at 166-A Lee Avenue, Brooklyn, New York?

A Yes.

Q At that clinic do you employ various providers of medical services?

A No, sir, I don't employ, I just rent the space.

Q Various medical doctors?

A Right.

Q And para-medical specialists?

A Yes, sir.

Q Do you have any chiropractors working at your clinic?

A At present?

Q I direct your attention to 1970, 1971 and thereafter. Did you have chiropractors working at your clinic beginning that time and thereafter?

A Yes, sir.

Q What was the arrangement between you and these various medical providers?

A We used to rent space to them and they used to pay us 30 per cent of the rent what they get from the Medicaid, from the Department of Social Services.

Q Was there a custom or practice as to how the rent would be paid by the doctors to you?

A Yes, sir. We used to wait -- there were two ways to collect the money: Either they pay us 30 per cent of what they took out, or they waited until the money came to them from the Department of Social Services, from Medicaid, which --

Q Or from factors?

A Yes, sir. After they get the check, they came with the check and they say, "I got this much money," and they make out a check and we deposit.

Q You would enter that on the books?

A Right.

Q Is that a corporation?

A Yes, sir.

Q What is the name of the corporation?

A Lee Avenue Management Corporation.

Q This would be entered upon the books of the corporation?

A Yes, sir.

Q Do you have those books with you today?

A Yes, sir.

MR. WILSON: May they be deemed markedExhibit 71 for identification?

THE COURT: All right, for the time being they may be deemed marked.

Q Dr. Alizadeh, did you have a Dr. Kavaler treating patients at your clinic?

A Yes, sir.

Q Can you tell from either your personal knowledge or by referring to your books when Dr. Kavaler first began working at your clinic?

A Yes, sir. I cannot say the exact day he started working, but the month and the year that we know -- I have books in front of me -- that he came to us -- he pay us a check on April 1, 1971.

Q April 1, 1971, was his first check?

A Yes. That means that he work in March and February, or before that.

Q To the best of your recollection, he started somewhere around Januaryor February, March --

A Within three months, right.

Q Can you tell me when you received the last payment?

A January, 1974.

Q Can you tell from the receipt of that payment the last time that Dr. Kavaler would have treated patients at that clinic?

A Exactly, I wouldn't be able, because he may have worked two months or three months prior to that payment.

Q The best of your recollection would be --

A December, November or October.

Q Of 1973?

A Yes, sir.

MR. WILSON: No further questions.

MR. ESBITT: Your Honor, I would like an opportunity to examine the records.

THE COURT: The jury may be excused briefly while counsel looks at the records.

(Jury leaves courtroom.)

MR. ESBITT: Your Honor,to expedite the trial, do you mind if I question the witness off the record, or on the record or whatever you wish?

THE COURT: I prefer that you look at the records and you can cross-examine him in the regular fashion. I am treating these records, in a sense, as 3500 material, although they are really not. I think you ought to take a reasonable time, as the statute provides,

to look at them, and then cross-examine him in the regular way.

Is there any more rebuttal testimony?

MR. WILSON: No, your Honor.

MR. ESBITT: Well, the doctor has prepared a statement, and I don't know what it means --

THE COURT: Mark it for identification.

xx (Defendant's Exhibit AZ marked for identification.)

MR. ESBITT: May I question the witness, your Honor?

THE COURT: No, sir. You will look at the exhibits and bring the jury back in and cross-examine him in the regular, traditional fashion. You may take a reasonable time to look at these records. You never met the doctor before, any of you, your investigator or you?

MR. ESBITT: I have not, your Honor.

MR. HANRAHAN: I have, your Honor, yesterday.

(Pause.)

THE COURT: Are you ready to proceed?

MR. ESBITT: Yes, sir.

THE COURT: All right, bring in the jury.

(Jury present.)

THE COURT: You may cross-examine, Mr. Esbitt.

CROSS EXAMINATION

BY MR. ESBITT:

Q Dr. Alizadeh, I show you Defendant's Exhibit AZ for identification and ask you to tell us if that is in your handwriting?

A No,sir, that is my secretary.

Q She took that information from your books and records?

A Yes, sir. She have a file for all the doctors and she writes in whoever pays, Dr. Jacobs, Dr. Kavaler, Dr. Napoli --

THE COURT: Please speak up, Doctor.

THE WITNESS: My secretary used to write it down here. From 1971 we didn't know whether and we look in the record and find out that is how he was coming in --

Q You know Dr. Kavaler?

A Yes, I do.

Q Did you have an arrangement with Dr. Kavaler that he would furnish Chiropractors for your clinic from time to time?

A Yes, sir.

Q And he did?

A Yes, sir.

Q Among those chiropractors were Dr. Winstead?

A Yes, sir.

Q Dr. Jacobs?

A Yes.

Q Dr. Napoli?

A Yes.

Q And Dr. Newfield?

A Yes.

Q Is it a fact that Dr. Kavaler himself worked in your clinic only in 1971?

A It might be. He did work in my office, but I don't know from what time to what time. After he left, I assign another doctor to replace him.

6A

Q I see. So that with respect to the other doctors, he had, in a sense, the concession for those chiropractors, did he not?

A Yes.

Q He would pay you rent for those other chiropractors from time to time?

A I really --

Q Pay you some money?

A I really don't know.

MR. WILSON: Objection. He's cutting the witness off.

A (Continuing) It was a long time, I really don't remember.

Q As you sit on this witness stand today, you cannot say with certainty that he worked in your clinic after 1971, can you?

A Not to my recollection. All I can say is from the record when was the last time he paid us a check.

Q But that check doesn't mean he was working there in 1973, does it? It merely means that you got some payment from him?

A That's possible.

MR. ESBITT: That's all.

REDIRECT EXAMINATION

BY MR. WILSON:

Q Dr. Alizadeh, was that the only arrangement with Dr. Kavaler to furnish chiropractors for the clinic?

A Yes, sir.

Q Were there any other arrangements like the foot doctors or medical doctors where someone would bring someone in and get a cut?

A No, Dr. Kavaler was the only one who promised me when he leaves to bring other chiropractors to work, and he did.

Q What was the arrangement you had with Dr. Kavaler?

A The arrangement I cannot recall. There are instances when he paid in behalf of other doctors, but I cannot tell the time.

Q Did the other doctors -- do you have records in there where those other doctors paid you rent?

A Yes, sir. Whoever paid me is here.

Q Pardon me?

A Whoever paid me is in the record.

Q So Dr. Kavaler would not have paid you rent if the doctor himself had paid the rent, is that correct?

A If the doctor didn't pay me, then Dr. Kavaler had to pay me.

Q I see. So there are two reasons why Dr. Kavaler would give you money?

A Right.

Q One, to pay the rent of some other chiropractor?

A Right.

Q And the other, to pay his own rent?

A His own rent.

Q When did you last see him at the clinic?

A You mean when he was working?

Q Yes.

A That I cannot recall.

Q Was it in 1973?

A I really cannot recall. The only way I can testify here or say is that the record shows when he paid me. Now, he paid me, whether it was in his behalf when he worked or he paid on behalf of another doctor, I cannot say. I just collect the money as a rent and I put it in the books there.

Q On this notepaper you have some various dates?

A Yes. It says here Mr. Winston. That's another chiropractor, for example.

Q Those are notes paid by your secretary?

A Yes, and she is here.

Q She would know whether or not these payments

were for Dr. Kavaler himself or for some other doctor?

A Maybe she knows.

Q Can you tell by looking at these books in front of you whether some other doctor paid the same month that Dr. Kavaler did?

A No. If there is a name of another chiropractor that is here --

Q See if Dr. Winston's name is there for September, 1972.

A September, 1972. I don't have the book here, sir, for September. This is all '73 -- January to December, '73.

Q Do you have payments for '73, March 13, 1973?

A Dr. Kavaler.

Q It says rent?

A Yes, but it doesn't say who.

Q $45?

A It doesn't say Dr. Kavaler, whether it is him.

Q Would you look in your books for March, 1973, and see if any other chiropractors paid their rent that month?

A No, sir, we don't have it. Here are all my receipts here. Department of Social Services, here, and that's the life insurance, and that's Blue Shield.

Q You see no entries for other chiropractors?

A Or any other doctor.

Q Do you have an entry for Dr. Kavaler?

A No, sir, not on this month.

Q Can you tell me when this entry, $45, 3/13, rent, was made?

A As I mentioned, Dr. Kavaler may have paid us in March and we deposit it on another month. Therefore, I really don't understand the books either.

Q You have your secretary here?

A Yes.

Q What is her name?

A Mrs. Silva.

Q Mrs. Silva?

A But she doesn't understand the books either. That's all she wrote here.

Q Where did she get that information?

A This is when the doctors paid here. I make it to write it down. At that particular month.

Q When she wrote this down, where does she get the information from?

A She receives a check --

MR. ESBITT: Objection. He is talking about what another witness does.

THE COURT: If he knows, if it was done at his request or under his supervision, he may testify to it.

Q You have a folder for records, are those all of Mrs. Silva's records?

A She receives the money and she entered it in the book. I sent a check to the bank.

Q She can tell by looking at the records who paid rent for what?

A Right.

Q She can tell whether or not Dr. Kavaler paid some other chiropractor's rent?

A Right.

MR. WILSON: I have no other questions of this witness, and I call Mrs. Silva.

THE COURT: Any other questions of Dr. Alizadeh?

MR. E[illegible]BITT: No, sir.

THE COURT: You are excused, Doctor.

(Witness excused.)

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GLORIA SILVA, called as a witness on behalf of the government in rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q Are you employed by Dr. Alizadeh?

A Yes.

Q At the Lee Avenue Management Corporation?

A Yes.

Q What are your duties?

A Well, I started out as doing general office work and then eventually I more or less managed the office for him.

Q I show you what has been deemed marked Exhibit 71 in evidence, which is a series of books or pages from books in front of you, have you seen those before?

A This here, this particular pile?

Q The green pages underneath.

A Yes.

Q And also Defendant's Exhibit AZ, which is a single piece of paper?

A Yes.

Q Is that in your handwriting?

A Yes, this is.

Q There are also some folders there which are your records, are they not?

A Yes.

Q Did you make up that piece of paper?

A Yes, I did.

Q Did you examine your records to determine the entries that you made on that piece of paper?

A Yes.

Q What do those amounts and dates indicate?

THE COURT: Well, is the paper that you prepared correctly reflecting data which is in the books and records?

MR. WILSON: I'm sorry.

Q This Defendant's Exhibit AZ, when did you prepare that document?

A Well, I would do this as I got my checks, I would write down --

Q No, the piece of paper in front of you. Did you prepare that today?

A No.

Q You didn't?

A No.

Q This piece of paper?

A This here?

Q This entire one, Defendant's Exhibit AZ.

A No.

Q Is that a part of your record?

A Yes.

Q That's your record you keep from time to time and make entries in it?

A Yes.

Q That's a page out of a record book?

A Yes, it is.

Q Do you make entries on that page from time to time as the events occur?

A Yes, I do.

Q What events are recorded on that page?

A The number of the check and the date and the amount.

Q On what occasion would you make an entry on that page?

A Whenever I receive it.

Q Received what?

A The check.

Q What were the checks for?

A The percentage of the amount he received on a check.

Q Are these rent checks?

A Yes.

Q You have one page for each doctor?

A Yes, I do.

Q Do you have all your other pages with you in that folder?

A Yes.

Q Do you make the entries on those pages at the time you receive the checks?

A That's right.

Q They are accurately made at or about the time these events occurred?

A As far as I know, yes.

MR. WILSON: At this time I will offer this into evidence and I would like to remark it for our purposes as Government's Exhibit 71-A.

THE COURT: All right.

MR. ESBITT: Voir dire, if your Honor please?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. ESBITT:

Q Mrs. Silva, I show you this page. Does this page, Government's Exhibit 71-A, is this page taken from the files and records of the Lee Avenue Management Corporation?

A Was that taken from the records?

Q Yes.

A I did this on my own. I'm not the bookkeeper. This is just for my records.

Q You took this on your own and you are not the bookkeeper?

A No.

Q Who is the bookkeeper?

A Miss Mclean.

Q You are not familiar with the books and records?

A I'm familiar with most of the things in the office. I'm familiar with what goes into this and what goes into that.

Q You didn't keep these particular records?

A I keep that particular record.

THE COURT: Which is this?

THE WITNESS: Thatparticular page.

Q Government's Exhibit 71-A?

A Yes.

Q You keep this in another kind of book?

A Yes.

Q What kind of book?

A I did this for a year or two until Miss Mclean took charge of them.

MR. ESBITT: Would you mark this for identifica-

tion.

MR. WILSON: Make that 71-B.

xx (Government's Exhibit 71-B marked for identification.)

Q Mrs. Silva, how long have you been working for Dr. Alizadeh?

A Since 1971.

Q In the course of your duties, did you get to know the various doctors that work in the clinic?

A Not all of them.

Q Did you ever meet Dr. Kavaler?

A Yes.

MR. WILSON: Objection, beyond the scope of voir dire.

THE COURT: Yes, sustained.

Q Did you know he was working as a chiropractor at your Lee Avenue Clinic?

A Yes.

MR. WILSON: Objection. She's testifying as a custodian of records.

THE COURT: That's correct. I'll sustain the objection.

Q Now, these entries, Government's Exhibit 71-A, are they in your handwriting?

A Yes.

Q All of them?

A Yes.

Q Where did you get this information from?

A If I opened the mail and I received a check, I would write it down.

Q So, all of those checks on this page are checks which Lee Avenue Management Corp. received from Mr. Kavaler, is that true?

A Yes.

Q Is that correct?

A Yes.

Q Did he send you checks before 1971?

A I wouldn't know.

Q You have no page for Dr. Kavaler before 1971?

A No.

Q Now, did you ever send bills out?

A No.

Q To your knowledge, did Miss Mclean send out bills between 1971 and 1975?

A No, we didn't.

Q No bills were sent out?

THE COURT: No bills to Dr. Kavaler?

MR. ESBITT: Yes, sir.

Q Were bills sent out to Dr. Kavaler?

A No.

Q Or to any other chiropractors?

THE COURT: I don't care about any other chiropractors. Let's get on with this case.

Q This notation of Dr. Kavaler No. 155,4-1-71, $211, is that No. 155 the number of Dr. Kavaler's check?

A Yes.

Q What does the date represent, 4-1-73?

A It could be the day I received it or the date on the check. Depending, it didn't matter really.

Q The amount $211, do you know what that represents?

A 30 per cent of whatever the check was. I don't know. That consisted of maybe -- I could receive it before and that might cover for a month before that. I was just interested in the amount that I got in.

Q Now, did you know that Dr. Alizadeh had an arrangement with Dr. Kavaler for Dr. Kavaler to furnish?

MR. WILSON: Objection, it is beyond the scope of voir dire.

THE COURT: It certainly is beyond the sscope of voir dire. Sustained. The lady is only here to sponsor the records.

Q Mrs. Silva, do you know whether or not these entries on this page are for a percentage of Dr. Kavaler's services or forany other chiropractor furnished by Dr. Kavaler to Dr. Alizadeh?

A Well, I couldn't be positive about that.

Q You could not. So it could be for himself or it could be for others, as far as you know?

A If he didn't come in that day and somebody else might have come in for him, I wouldn't know. As long as I got my check at the end of the month.

Q If other chiropractors work at the clinic under an arrangement between Dr. Kavaler and Dr. Alizadeh and Dr. Kavaler sent a check for that purpose to Dr. Alizadeh, you woudln't know whether it was for Dr. Kavaler's services or somebody else's?

MR. WILSON: Objection.

THE COURT: I will sustain the objection for two

reasons: It is improper voir dire and we have just had Dr. Alizadeh answer that question.

MR. ESBITT: He did answer it.

THE COURT: Please confine your questions to voir dire.

MR. ESBITT: No further questions.

MR. WILSON: I offer 71-A in evidence.

THE COURT: Received in evidence.

Do you have any objection?

MR. ESBITT: My objection is --

THE COURT Overruled.

(Government's Exhibit 71-A was received in evidence.)

BY MR. WILSON:

Q I direct your attention to 71-B which is now this folder full of documents, this is the record you maintained of the rent receipts?

A Yes.

Q You maintained this record in the normal course of your duties, of your many duties at Lee?

A Yes.

Q It is the normal course of such duties or business of a clinic like this to keep a record of your income, is that correct?

A Right.

Q Would you look in that folder of documents and see if yc have pages for the following other chiropractors: Dr. Winston?

A Yes.

Q Dr. Jacobson?

A Yes.

Q Dr. Napoli and Dr. Newfield? Would you pull thosepages out? Would it be one page for each doctor for all the years?

A No. I putit on different pages.

Q Different pages for different years?

A I think so.

Q Would you pull out the pages for 1973 and 1972 in t'ose documents?

A I didn't understand you. What was that?

Q Would you pull out the pages for Drs.Winston, Newfield, Jacobson and Napoli for the year '72 and '73?

A '72 and '73?

Q Yes,please.

THE COURT: The records are permanently fastened together, I don't think I want to have her detach them.

Q Can you identify them all?

A Yes.

MR. WILSON: At the conclusion of the trial, I request permission to substitute copies for the originals.

THE COURT: Absolutely. I don't want to take the doctor's records.

Q Would you indicate to me now Dr. Newfield's records for 1972 and '73?

THE COURT: Don't we have his name on the page?

Q All right, just hand me the page.

A Here.

Q Dr. Jacobsen, would you give me those documents, please.

A I don't have Jacobson.

Q Who do you have?

A They are all in here somewhere. Here is Jacobson and Napoli.

THE COURT: Mark them for identification.

MR.WILSON: We are missing yet Winston. We will mark them 71-C, 71-D and 71-E --

THE COURT: Next question, Mr. Wilson.

MR. WILSON: I offer these in evidence.

Q Mrs. Silva, when you receive a payment for a rent even if it is delivered for someone else, on whose page

do you record that payment?

A Depending on who -- sometimes if the check has the doctor's name on it or whoever it was delivered by.

Q Well, if Dr. Newfield delivered a check for Dr. Napoli, just dropped by and dropped off Dr. Napoli's check along with his own, whose record would you record the payment on?

A If the name is written on it, I would put Dr. Napoli or Newfield. Ifnot, I would more or less try to think who was working at that time.

Q It would go to the person wo owed the rent?

A Right.

MR. WILSON: I offer those in evidence.

THE COURT: State the numbers for the record.

MR.SILSON: 71-C, D, E and F.

Q Did you find Winston?

A Maybe I didn't write it down for Winston, I don't recall.

MR. ESBITT: I object to these, if your Honor please.

THE COURT: Objection overruled; received in evidence.

A Here is Winston.

MR. WILSON: Would you mark 71-G.

THE COURT: Same ruling on 71-G.

A I have his name written but I didn't submit one.

Q It is blank?

A Yes. Just the year is on there.

Q Mrs. Silva, you know Dr. Kavaler, do you not?

A Yes.

Q Have you seen him around the clinic?

A Yes.

Q Have you seen him on nights and days when he treated patients?

A I seen him on days.

Q When do you recall was the last year you saw him?

A The last time I saw him?

Q Yes.

THE COURT: The last time you saw him treating patients is what the question was.

A I'm not too sure, '73, '72.

Q '72 or '73?

A Yes.

Q The last payment you saw was January of '74, do you remember him treating patients then?

A Could be.

MR. WILSON: Your witness.

(Government's Exhibits 71-C through 71-G were received in evidence.)

(Continued on next page.)

pm

CROSS EXAMINATION

BY MR. ESBITT:

Q You said could be, are you positive under oath that you saw him in 1973?

A Yes, I did.

Q And in '72?

A '72, possibly.

Q And '71?

A '71, I did.

Q You saw him in '71.

MR. WILSON: No redirect. No further witnesses. We rest.

THE COURT: Anything else from you, Mr. Esbitt?

MR. ESBITT: No.

THE COURT: All right, both sides rest.

Members of the jury, you have still not heard the closing arguments of the attorneys and you have not heard my instructions as to the law. I would like to think that is also important. Therefore it is vital in the interests of justice and fair trial that you keep an open mind, don't discuss this case or don't reach any conclusions about this case until you have heard the closing arguments of the attorneys and my instructions as to the law, all of which will happen tomorrow morning. In just a moment

people who live in Westchester County --

THE COURT: No speeches now. I thought you were answering his question.

A Mr. Wilson said that --

THE COURT: No more. Your counsel may pose more questions.

(Defendant's Exhibit AB was received in evidence.)

BY MR. ESBITT:

Q Did you in fact render those treatments that are set forth on that invoice?

A Yes.

Q To Alice Rodriquez?

A Yes.

Q On the date indicated?

A I stand by them.

Q Was that a false invoice?

A Not at all.

Q By the way, Doctor, did you keep any recofds of your treatment to patients in Lee Avenue?

A I did.

MR. ESBITT:

Q Please mark this for identification.

(Defendant's Exhibit AC was marked for

identification.)

Q I show you Defendant's Exhibit AC, entitled "Diary, 1971" and ask you if you can identify that.

A It is mine.

Q What is in that diary?

A It was used when I worked at Lee Avenue.

Q What year?

A 1971. It represents the period of my activity at that clinic.

Q Did you keep a record in that diary of every patient you treated in Lee Avenue every day on which you treated that patient?

A Yes, I did. As a matter of fact, in having gone through this, I saw some of the patients at Lee Avenue on alternate days when they came to Galler Medical and so I marked it in this book and alongside of it in parentheses I wrote "Galler".

Q When did you make the entries that appear in this book of yours?

A The day this treatment was given.

Q You are certain of that?

A Positive.

Q They were not made for the purpose of this trial?

A No, sir.

Q They were not made subsequent to the day when you gave the treatment to this patient?

A No, sir.

MR. WILSON: Object. Counsel is impeaching his own witness.

THE COURT: No, he is not. I will overrule the objection.

MR. ESBITT: I offer it in evidence. If your Honor please, to save time I don't believe Mr. Wilson has seen this book before and I will make it available to Mr. Wilson for examination and, in addition, I am making it available for any type of testing that he wants. He may send it to Washington or anything else.

THE COURT: I am not going to hold up the trial while anybody sends papers to Washington.

MR.WILSON: I object to that.

THE COURT: Yes.

MR. WILSON: I decline the suggestion.

THE COURT: Why don't you examine it later, at the end of the day, perhaps.

MR. ESBITT: He may have the book overnight, if he wishes.

THE COURT: I will reserve on the offer until

you have had a chance to look at it, Mr. Wilson.

MR. ESBITT: Mark this for identification, please.

(Defendant's Exhibit AD was marked for identification.)

Q I show you this book, this blue book, marked Defendant's Exhibit AD, and on the outside it says "No. 1, Payroll Hours."

Can you identify that book?

A Yes, sir.

Q Was is it?

A I began to keep a running record of the patients that I treated at Galler, stating on 4/15/70, and I gave up on it after a while.

Q You started 4/15/1970 and you kept it up until when?

A I kept it up until March 8, 1971.

Q When were the entries in that book made, Dr. Kavaler?

A At the time that I wrote it, at the time of the occurrence.

MR. ESBITT: I offer it in evidence.

A There is one exception here, an address that I wrote in here, but that has nothing to do with the case.

THE COURT: I will reserve in the same fashion as the last exhibit.

Q Dr. Kavaler, I show you Government's Exhibits 8 and 8-A for identification, which refers to Herman Pas.

A Yes.

Q Do you remember that patient?

A Very well.

UNITED STATES OF AMERICA

vs. 76 Cr. 241

MAX KAVALER

July 27, 1976
10:50 a.m.

Trial resumed.

- - -

(In open court; jury present)

THE COURT: Good morning.

M A X K A V A L E R resumed.

MR. ESBITT: At the conclusion of the last session yesterday afternoon I had offered in evidence Defendant's Exhibit AC and AD for identification in evidence and there has not been a ruling as yet.

MR. WILSON: May I have further voir dire on that, your Honor?

THE COURT: Which exhibits are those?

MR. WILSON: The two books, your Honor.

THE COURT: Yes, he may be voir dired on the two books.

VOIR DIRE EXAMINATION

BY MR. WILSON:

Q Dr. Kavaler, do you recall that in 1971 -- I'm sorry, January, 1972, when the Galler Medical Center was issued a subpoena by the New York City Department of Investigation?

A Yes, I do.

Q Do you recall what that subpoena called for?

A Yes.

Q Did it call for the books and records of the corporation?

A 858 Flushing Corporation.

Q Did it call for any and all records reflecting names addresses and Medicaid identification number of patients treated within the premises of the clinic and names and Medicaid numbers of providers and dates of treatment and claims for reimbursement for said patients --

A It called for the medical records.

THE COURT: Could I have the last question read back.

(Question read)

THE COURT: Do you understand counsel's request, Doctor?

THE WITNESS: I think so.

THE COURT: Can't you answer it yes or no?

THE WITNESS: I did, yes -- no, I am sorry.

THE COURT: What is your answer?

THE WITNESS: That it called for the medical records and I recall distinctly that --

THE COURT: It did not call for what he just said to you?

THE WITNESS: From my records, no.

Q Let me show you this document and ask if you have seen it before.

THE COURT: State the number for the record.

MR. WILSON: Government's Exhibit 52 for identification.

A Yes.

Q Do you recall receiving that subpoena.

A Yes, I did.

Q I show you Exhibit 53 for identification and ask you if you recall receiving that document and I ask you if that document was served on you by a representative of the government on November 26, 1974.

A I never received this.

THE COURT: He means a copy of it, Doctor. Did you ever see a copy of that?

THE WITNESS: No, sir.

Q You never received a copy of that?

A No, sir.

THE COURT: What is the number of that exhibit?

MR. WILSON: Exhibit 53 for identification.

MR. ESBITT: May I see the exhibit?

THE COURT: Yes, certainly.

(Pause)

Q You have never seen Exhibit 53 for identification?

A No, sir.

Q I show you Exhibit 54 for identification and ask if you have ever received a copy of that document.

A No, sir.

MR. ESBITT: May I see that?

MR. WILSON: I have not offered it.

THE COURT: Counsel may see anything that is shown to the witness, under these circumstances.

Q Do you recall having conversations with an Assistant United States Attorney in December of 1974?

A I do.

Q Do you recall that person's name?

A Yes.

Q Who?

A Miss Shirah Neiman.

Q During the course of those conversations did you discuss the production of documents from the Galler Medical Center?

A She had them.

Q My question was, did you discuss the production of documents of the Galler Medical Center? Do you understand the question?

A No, not quite.

MR. WILSON: May it be read back?

THE COURT: Please read the question.

(Record read)

A She had them and then she said to me -- may I --

THE COURT: If you understand the question, answer it responsively. If you don't understand the question, I will require that it be reframed.

THE WITNESS: Your Honor, it can't be answered yes or no.

THE COURT: I don't insist you answer it yes or no.

A She already had the medical records of the Galler Medical Center, the 858 Flushing Corporation, and then she said to me, "Did you ever treat any patients?"

And I said "Yes, I did."

She said "Are your records available?"

And I said "Yes."

Q Did you make them available to her?

A Yes.

Q Do you recall having a conversation by telephone with Miss Neiman on December 30, 1974 in which you and Miss Neiman discussed your failure to produce the records after you had previously promised them? Do you recall that conversation?

A I do remember the conversation. She called me and said to me that she had not yet received my own records, which I offered to her, and I said --

Q Did you tell her you had some records --

MR. ESBITT: I think the witness is being interrupted, your Honor.

THE COURT: He is, but I believe he did answer that he did recall the conversation. I will let the witness finish the answer.

A I said to her it was just on the eve of New Year's and I thought that the mails would be busy so I

couldn't mail it to her and, as a matter of fact, I hand delivered them or had them hand delivered the very next day.

Q Did you tell her that you had some records at your home and some at the clinic?

A No, I had records at my home. I told her that is where they were.

Q Did she tell you she would accept them by certified mail?

A Yes.

Q But you brought them in in person?

A Yes -- not my person --

Q At that time did you tell Miss Neiman that you wanted to be totally cooperative, that your records were an open book because they were properly kept?

A Yes.

Q You don't recall receiving either one of the two subpoenas showed you?

A No, sir.

Q When is the last subpoena you received?

THE COURT: Understand he is talking about copies of the papers and he is not talking about the specific exhibit he is showing you.

THE WITNESS: I am aware of that, your Honor.

THE COURT: He is talking about a copy of it.

THE WITNESS: I am aware of that.

A The last subpoena I received was from the United States Attorney's office asking for certain payroll records, asking for cash books, asking for corporate records, and I told Miss Neiman that I didn't have them, because I didn't have them.

Q That is the only thing they asked for, financial records?

A I said everything had been taken by the city several years before.

Q Isn't it a fact that you were served a subpoena from the federal government which called for all records in your custody or control related to medical services provided by you or others for the year 1970, 1971 and 1972, including but not limited to doctor's invoices, patient records and treatment plans of the clinics?

A If that is the copy of the subpoena you showed me a minute ago, I say no.

Q You have never seen this subpoena?

A No, sir.

THE COURT: It is obvious he has never seen that subpoena. The question has to be phrased in terms of

a copy of that subpoena.

Q You say you received a subpoena from Miss Neiman or directed to you by Miss Neiman? Did it have your name on it?

MR. ESBITT: If your Honor please, I submit this is not a proper voir dire --

THE COURT: I think it is proper voir dire to explain these two books, but the questions are not being framed properly and I insist they be framed properly.

MR. ESBITT: Your Honor, the question is whether these books are admissible on his testimony.

THE COURT: Would you like me to discuss it with you further, in the absence of the jury?

MR. ESBITT: Yes, your Honor.

THE COURT: Members of the jury, would you please withdraw. Will counsel and the court reporter step inside, please.

(In the robing room)

THE COURT: Let me see the books and subpoenas, please.

MR. WILSON: Yes, sir. (Handing).

MR. ESBITT: May I make my point, your Honor?

THE COURT: Yes, indeed. I think I understand your point, but I would be delighted to have you make it.

You see, if these questions were properly framed, this fellow is putting himself into a conflict about a fact which is material to this case but not material to his guilt or innocence and he is putting himself in a predicament because, I daresay, there is a United States marshal somewhere in the Southern District of New York who served a copy of this subpoena on the good doctor.

MR. ESBITT: My point is merely this, your Honor: I don't challenge Mr. Wilson's right to cross-examine the witness with respect to this, but the question is is it voir dire?

THE COURT: Voir dire can establish that these two books, if the government has a good-faith contention, were a recent contrivance. If the government believes of circumstantial evidence, they are not particularly dog-eared or earmarked in the way my desk book gets, and I assume this doctor was busier than I am, and a typical desk book you have on your desk and make current entries in would pretty well be up by the end of the year and also it covers a suspicious time period. The writing in many pages looks as if it were contemporaneously entered on a single page in a single handwriting in a single time,

with the differences in ink that you ordinarily expect, but are so compound, and Exhibit AC for identification has the appearances of a contrivance. The government is entitled to make that contention. It is relevant to the weight the jury gives to it and it is relevant to its admissibility, if it be a contrivance, that he received subpoenas or had oral conversations with Miss Neiman where he disclaimed the existence of such books and I think it is proper voir dire.

What discourages me is that I am fearful that he is placing himself in a position of perhaps making a false statement about a matter which doesn't relate to his guilt or innocence, and that is the question of whether he was served with a subpoena and, I daresay, they can prove that and I think in fairness -- I don't meant to advise you what to do but I think in fairness you ought to point out to him the problem which may arise. Assuming he is acquitted here, they could charge him under 1623, if they feel so inclined, and if he is not lying about guilt or innocence, he is lying about whether the U.S. Marshal served him with a subpoena or whether he had conversations with Miss Neiman, and under that statute they can prove a prima facie case in a one-on-one situation and I find it somewhat disturbing.

MR. ESBITT: I merely point out to your Honor on the question of voir dire every question Mr. Wilson has asked is directed to, I think, an attempt to show that they are not entries made at the time that he says they were.

THE COURT: I think that can be shown on voir dire, although I must say this to you, Mr. Wilson, if they believe the witness and if the witness sticks to his story, these exhibits will be admitted in evidence. If the witness doesn't stick to his story, which is highly unlikely, then I would sustain an objection to them. There is a lot of circumstantial evidence bearing on the books, intrinsically they look like fakes, or a juror could think they do, and the fact that he didn't produce them at a time when he was cooperating with Miss Heiman in response to both the subpoena process and in response to oral requests as well, this is some evidence the jury could use in determining they are entitled to no weight, but if there is the slightest evidence in the record that they were regularly kept in the normal case of business, I would leave that issue to the jury.

I will not rule out the books and risk the creation of unnecessary appellate error in this trial and you should understand that.

MR. WILSON: I understand that, your Honor.

rmp4

THE COURT: If you are trying to set up this fellow, do it correctly and don't give him a lot of foolish questions that permit Bronston answers.

MR. WILSON: He is being supertechnical in his answers, your Honor.

THE COURT: The Supreme Court says he has a right to do that and you better read the Bronston case.

MR. WILSON: I asked if he received a copy of that subpoena --

THE COURT: You didn't. You asked if he received 53 for identification and he said no.

MR. WILSON: I will get back to that.

THE COURT: You have done that finally, but no more fooling around with this topic.

MR. WILSON: There are two trial subpoenas served on him on July 8, one on Galler and one on Lee, and the one for Galler asks for all medical reports, files, records, results of tests --

THE COURT: You don't have to read it. You may have limited voir dire, but --

MR. WILSON: What is the result of him not turning this book over on July 8, prior to trial? We had reciprocal discovery on this.

THE COURT: The jury can consider that fact as

bearing on the genuineness of the book, but I won't keep the book out of the record. I won't say he is precluded from proving the truth, if that be the truth.

MR.WILSON: He discussed that at a pre-trial conference and it was agreed the records would be turned over pre-trial without the necessity of a hearing, and I discussed that with Mr. Esbitt.

MR. ESBITT: You discussed with me and you wanted the defense to disclose to you copies of letters, letters we had in our files, and you asked for an appointment with Judge Brieant for that purpose, and having rechecked Section 16, you decided not to make that application to the Judge and we appeared before the Judge on a wholly different application.

THE COURT: My wish is to let all fact issues be determined by this jury and to have a full search for the truth and I am not going to preclude anybody. I am anxious that I not get into side issues that we don't have to get into.

Yesterday, the defendant told you that all these ladies, and Mr. Pas, are all a buncy of liars. That is what he told us. That is really the issue in the case, isn't it?

MR. ESBITT: I don't agree with that, your Honor.

THE COURT: I understand your contention, Mr. Wilson, and I think it is unfortunate but there is nothing I am going to do about it.

MR.WILSON: If we didn't turn something over, what would be the result?

THE COURT: Different rules exist on that.

MR. ESBITT: He did not testify that these people are liars, your Honor, not a bit. As a matter of fact, we will show from the record at the appropriate time --

THE COURT: The record will show what he said. They could be liars, I don't know. I am not here to determine the facts.

MR. ESBITT: I am not going to suggest in this trial these people are liars, but I am going to suggest in summation that they are mistaken.

THE COURT: They are all mistaken?

MR. ESBITT: Yes, sir, and there is a good reason why they are mistaken, and that will be discussed with the jury at the appropriate time.

THE COURT: You are quite free to do that.

2A

(In open court.)

(Jury not present.)

THE COURT: Bring in the jury, please.

You may take the stand again, Doctor.

(In open court.)

(Jury present.)

THE COURT: You may resume, Mr. Wilson.

M A X K A V A L E R, resumed.

VOIR DIRE EXAMINATION CONTINUED

BY MR. WILSON:

Q Dr. Kavaler, you clearly recall receiving a subpoena in 1971 or '72 from the Department of Investigation?

A Yes, I do.

Q You turned over certain records at that time pursuant to the subpoena?

A Yes, I did.

Q You were given a receipt for those records?

A Yes, I was.

Q Let me show you Exhibits 56-B and 56-C for identification, and I ask you if you recognize those documents and if you do --

A This is not the kind of receipt I received.

Q Does it appear to be a receipt for the records you turned over for an inventory, if you know?

A Yes. I remember this. This one I remember.

Q Which one, what's the tag say?

A Government's Exhibit 56-B.

Q That is an inventory of records --

A These were the bills. I had an accordion file with all the bills I paid for things that I bought.

Q In showing you 56-C and looking at the items in that document, were they turned over to the City also?

A I gave them everything that I had. I gave them the bank statements, the cancelled checks. I don't remember the 105-05 N.B.Corp. because I don't remember having it.

Q I show you 56-A -- well, let's finish with 56-C. What is accurate or it is not accurate of records you turned over?

A I don't recall this except I remember I gave them bank statements, my cancelled checks from the Chemical Bank.

Q I show you 56-A and I ask you if you --

A Yes.

Q Have you seen that?

A Oh, yes.

Q That's a receipt for 14 file drawers full of medical records?

A Yes, sir.

Q So, 56-B you've seen and 56-A but 56-C you have

not seen before?

A I don't recall that.

MR. WILSON: I offer these in evidence.

THE COURT: I think perhaps they would be best offered on cross-examination.

MR. WILSON: Very well, your Honor.

THE COURT: The Court may consider them in connection with its ruling. But right now you're conducting voir dire and not offering exhibits to the jury.

Q Now, directing your attention to December of 1974 when you had your conversations with Miss Neiman, you do recall receiving the subpoena from the Federal Government?

A No, I do not. Mr. Sparrow told me that Miss Nieman wanted to see me.

Q Did you ever receive either yourself or on behalf of Galler Medical Center a subpoena from the Federal Government for records?

A Yes.

Q You did?

A Yes, for records.

Q Pardon me?

A Yes.

Q When?

A Probably December of 1974.

Q Who did you receive the subpoena from?

A I think his name was Mr. Cahn.

Q Mr. Cahn. Was he an employee of the Federal Government?

A I assume so.

Q He represented himself to be?

A Yes.

Q Did he work for Miss Neiman?

A Did he work for Miss Neiman?

Q Yes.

A I don't know.

Q If youknow.

A I don't know.

Q Have you seen Mr. Cahn since that time?

A Yes, I did.

Q Did you see him at a previous court hearing?

A Yes.

Q Did you know at that time he worked for Miss Neiman?

A I guess so.

Q What did the subpoena look like that you received from Mr. Cahn?

A What a subpoena looks like.

Q Was it on a piece of paper?

A Yes.

Q Was it a long piece of paper or a short piece of paper?

A That's relative, and I don't know. It was a subpoena.

Q Now, I show you 53 and 54 and ask you to examine them and tell me if what you received from Mr. Cahn is similar to either one of those two documents.

A I don't see -- is this the attached rider?

Q Whatever is attached to the document.

A I didn't see this.

Q Do you recall seeing anything similar to either of those two documents?

A Probably similar in size and it asks for -- it asks for records of 858 Flushing Corporation and I told him that the City of New York, Department of Investigation, had already received them.

Q Did they ask for its medical records?

A Nothing more than what was given -- no, I don't believe so.

Q Never asked for medical records?

A I don't believe so.

Q How was it you turned over to the City 14 drawers of patient files?

A That was in 1971.

Q You turned them over to the City?

A That's what I said, but not to the Federal Government.

Q Pursuant to the subpoena?

A Pursuant to the subpoena from the City of New York by the Department of Investigation.

Q So you told Miss Neiman --

MR. ESBITT: I object.

THE COURT: Overruled.

Q You told Miss Neiman that you gave all your medical records to the City?

A I have to tell you this.

Q Dr. Kavaler, just answer my question. Mr. Esbitt will handle other matters. Do you recall the question I asked you?

MR. WILSON: Would you read the last question back, please.

THE WITNESS: I handed over medical records to the City.

Q And you told Miss Neiman all your medical records had previously been turned over to the City?

A Yes, medical records.

Q You had no medical records to give her?

A Mr. Wilson, they asked --

Q Yes or no?

THE WITNESS: Your Honor, I can't say yes or no.

THE COURT: Is it true at the time you met with Miss Neiman you told her that you had turned over all of your records to the City?

THE WITNESS: All that they had requested, I had.

THE COURT: So, you had nothing that they had requested which you had not parted with, is that right?

THE WITNESS: They had asked for all the medical records up to 1971, your Honor. Then I spoke to Mr. Aberman and I said some of these patients are still coming in and that they are necessary for the continuation of treatment. They agreed to lie some of the 1971 records to remain. They took these 16 or odd files, and that's what I told Miss Neiman and that's what I assumed she wanted. Because we did have current records.

Q Do you recall specifically what the City subpoena asked for in medical records?

A No, I do not. It had a time.

Q Let me show you Exhibit 52 and direct your attention to Paragraph 11 on the rider and ask you if it refreshes your recollection after reading that?

A Yes.

Q Do you recall now that the City asked for any specific years of the medical records or for all of them?

A This was served in 1971. I told them, I told them that we had current records and we had old records. Because at that time I changed the record-keeping system because I didn't like those little cards, and they took the little cards. Now, some of those little cards on the current patients were now sitting in the larger files and they permitted that to stay.

Q So --

A I tried to hold nothing back from them.

Q You did not give the City all your medical records after all?

A Mr. Wilson, I gave them everything that they asked for after we spoke.

Q Now, what did Miss Neiman ask for?

A Miss Neiman asked for a duplication of what I had already given.

Q Isn't it a fact that she asked for medical records for several years?

A For several years?

Q For a wider period of time than asked for by the City? Isn't it a fact that Miss Neiman asked for records for the year 1970, 1971 and 1972, including but not limited

to doctors' invoices, patients' records and treatment plans?

A I don't remember that at all.

Q You don't remember it. But whatever she asked for you told her that you turned all that over to the City?

A Yes. She asked for corporate records. She asked for seals. She asked for cash disbursements and these are the things that I didn't have, and I told her.

Q Did she ask for medical records?

A No. She had medical records.

Q Did she ask for medical records?

A No.

Q She did not ask you for medical records.

A No. I don't recall that but I do recall --

Q Wait a minute, Dr. Kavaler. The question is, did Miss Neiman ask you for medical records.

A She may have.

Q She may have?

A Yes, and I told her the State of New York had them.

Q But you didn't tell her the State of New York might have the records going up to 1971, you forgot to tell her that?

A I didn't forget to tell her anything, Mr. Wilson. I told her whatever I thought she requested, I thought that the city had.

Q Dr. Kavaler, I want to get this straight. What did you tell Miss Neiman about what medical records the city had and what medical records you had?

A The things that she asked me for, I told her that the city had. This is what I remember.

Q You don't recall her asking you for the records from 1970-71 and '72 in her subpoena?

A The city had those records.

Q You just testified a moment ago that they only had records going up to 1971?

A Yes.

Q Pardon me?

A Yes.

Q So why was it you told Miss Neiman that the city had all the records she had asked for?

A Mr. Wilson, it was my understanding that I told her properly at the time and I held nothing back fromher nor did she ask me for anything new when she spoke to me in her office.

Q The receipt you received from the city says 14 file drawers containing patient medical records June 1968 to March of 1971.

Did she have a copy of that receipt?

A I don't know.

Q So, you don't recall today what you told Miss Neiman about your medical records, is that fair?

A Not if we are speaking about a year or a half year.

Q You don't recall which year she asked you about?

A No, sir.

Q She could have asked you about more than '72 and you said you didn't have them.

MR. E[illegible]RITT: I object to that.

THE COURT: I will sustain the objection to that question.

Q Did you ever receive any other subpoenas for records from Galler?

A No.

Q You did not. How about your employees, did an employee of yours ever accept a subpoena on your behalf?

A Not to my knowledge, no.

Q Do you know Evoone Malin?

A I'm sorry, yes.

Q Does that refresh your memory?

A She wasn't working there at the time.

Q I direct your attention to July 8, 1976.

A Yes.

Q Did Evonne Malin accept a subpoena on your behalf?

A Yes, she did.

Q Did there come a time when you looked at that subpoena?

A May I see it?

Q Did you look at it or did you receive a copy of it? Do you understand the question?

A Yes, I do. I'm trying to think of what the

subpoena was, whether it was -- I think it was a subpoena for her. I'm not sure.

Q All right. I show you this document marked Government's Exhibit -- I'm sorry. The one I will show you is Government's Exhibit 55 for identification. I ask you to look at that document and tell me if you have seen it or a copy of it.

A Yes.

Q You have seen it?

A Yes. And I complied with it.

Q You complied with the request to produce all medical records, files, reports, results of tests, treatment plans and all file copies of Medicaid invoices for following patients for the period 1970 to date and it has the list of patient names?

A Let me look at it more carefully. I thought it was --

THE COURT: I think perhaps that last question may go beyond the scope of the voir dire, Mr. Wilson. As I heard you read it.

MR. WILSON: Maybe I can rephrase it.

Q Dr. Kavaler --

A I gave everything that I had except --

MR. ESBITT: Continue, finish your answer.

A Except there may have been one or two small pages that I was not aware of, otherwise, you received all the medical records.

Q Dr. Kavaler, would you tell me why you didn't turn over this little book marked Defendant's AD for identification.

A Because that wasn't a medical record of these patients.

THE COURT: It's what?

A They were asking me for the medical records specifically of these patients, the ones that were used or that was my best understanding. That I gave to Mr. Esbitt and was picked up on Friday morning.

Q Dr. Kavaler, are any of those patient names found in that book, Defendant's Exhibit AD for identification?

A Yes, I think so.

Q They are?

A Yes.

Q Did you discuss this with your attoenry when you received this subpoena?

A No, no.

Q Did you ask Mr. Esbitt if this should be turned over with the medical records?

A It never dawned on me, Mr. Wilson.

THE COURT: Wait a moment.

MR. ESBITT: I would like to object.

THE COURT: Sustained as to what he asked his attorney, Mr. Wilson.

Q You assumed --

A You wanted the medical records, that is what was asked for.

Q You didn't turn overthe book. How long did you have the book?

A That book has been in my office since at least 1970.

Q Did there come a time when you lost the book for a while or misplaced it?

A Yes, I didn't know where this was. When our office was being renovated, which it was, I found it and I put it on the side. As a matter of fact, it was in my home because I put down the address or the name of some private patient from my Cedar Hurst practice on here and I told you that yesterday.

Q When was it lost?

A It was never lost.

Q You always knew where it was?

A No.

Q When did you not know where it was?

A I would say I came across it several months back.

Q Did you know where it was on January 1972 when the city subpoenaed all your records?

A No, I did not.

Q You did not.

Did you know where it was in December of 1974 when Miss Neiman asked for your records?

A When she personally asked me?

Q Yes.

A She asked me for my case history cards.

Q Dr. Kavaler, my question was, did you know where it was in December of 1974 when Miss Neiman asked for your records?

A It seemed to be such an insignificant thing.

THE COURT: Can't you just answer the question? Did you know where it was?

THE WITNESS: No, I didn't know where it was.

Q You didn't know where it was. When did you find it, to the best of your recollection?

A A few months ago.

Q Before you got this later subpoena?

A Yes.

Q You interpret that subpoena as not covering your private notebook with your patients' names on it?

A Yes.

Q I show you Exhibit 56 and ask if you have ever seen this document.

A No, I never saw this document.

MR. ESBITT: May I see that document?

Q Did you have conversations with Dr. Alizadeh at Lee Avenue Medical Center about the subpoena served on him?

A Yes.

Q Did you discuss medical records?

A Yes.

Q Do you recall being asked prior to trial to turn over any patient records you had from Lee Avenue in addition to Galler?

A No.

Q You do not recall being asked that?

A No.

Q You have no recollection of apeparing in court with your attorney and there being a discussion on the record about reciprocal discovery of medical records?

A Lee Avenue?

MR. ESBITT: Excuse me. I object to that.

THE COURT: I'll sustain the objection to that at this time. I think perhaps we ought to defer any further discussion of this matter for cross-examination.

MR. WILSON: Yes, your Honor, I have just one more question.

Q Dr. Kavaler, did that little red book -- actually, I have two questions. The first question, was this lost for a period of time?

A I knew where it was all the time.

Q You knew where it was all the time but it was the other book that you misplaced for a number of years.

THE COURT: State the number.

A Yes.

Q Defendant's AC for identification.

Could you tell the Court or jury why the book begins with the first entry only being on Wednesday, February 10, 1971 and then it ends on Thursday, May 27, 1971

A That's the period of time covered by my working at Lee Avenue.

Q You didn't work at Lee Avenue in the past, May 27, 1971?

A I worked there for about five months. So,

jpr10 Kavaler-direct

we're talking about --

Q Is it not a fact that you continued to work at Lee Avenue until 1973?

A No, it is not.

Q You never worked at Lee Avenue past May 27, 1971?

A No, sir.

MR. WILSON: No further questions.

MR. ESBITT: I offer it in evidence.

MR. WILSON: I object on the ground they are recent fabrications and also they are self serving statements.

THE COURT: Those are issues which the jury must consider because they involve factual issues. I will instruct the jury at the appropriate time concerning those issues and Iwill receive them in evidence at this time.

(Defendant's Exhibits AC and AD were received in evidence)

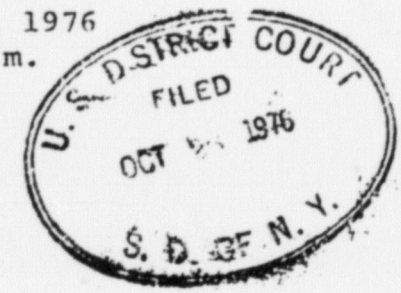
United States of America

v. 76 Cr. 241

Max Kavaler

New York, New York

July 28, 1976
10:10 a.m.



- - -

(Trial resumed.)

- - -

(In open court; jury not present.)

MR. ESBITT: Your Honor, I have an additional request to charge.

THE COURT: Tell me the gist of it.

MR. ESBITT: With respect to the substantive counts, the substantice counts --

THE COURT: Just give me your request.

MR. ESBITT: -- that relat to Lee Avenue, I ask your Honor to charge the jury that the substantive counts relating to Lee Avenue, Counts 15, 16, 18, 19, 22, 25, 26, 27 are substantive counts not related to the conspiracy charged and must be considered by the jury independent of the proof with respect to the conspiracy.

THE COURT: I am willing to tell them they are not involved in the conspiracy. However, I am not planning to

charge the broad Pinkerton rule in this case because all of the evidence of the bad invoices, the falsified invoices, are all over Dr. Kavaler's own signature and there is no proboem of Pinkerton in this case. This is not a typical Pinkerton conspiracy by any means. I am willing to tell them it is not contended the Lee Avenue counts were crimes which were committed in furtherance of the conspiracy.

MR. ESBITT: That is all I ask. Also the same with respect to the additional substantive counts, for the reason that your Honor, I believe, has satisfied yourself that this conspiracy, if it existed at all, terminated March 27th --

THE COURT: I think it is March 23rd, but that is a jury question.

MR. ESBITT: It was around that time, whatever the date was, when Mr. Wilson established the stock certificates. All the other substantive counts which do relate to Galler occurred after that date.

THE COURT: All of them?

MR. ESBITT: Yes, sir, all of them, and I would like a similar charge because if there was a conspiracy, it terminated before March 31st --

THE COURT: I think that is a question for the jury, when it terminated. I happen to believe that is

when it terminated.

MR.ESBITT: If the jury believes that the conspiracy terminated before March 31st of 1971, then these substantive counts also cannot be connected in their minds with the conspiracy and they must decide them solely independent of the conspiracy.

THE COURT: I am not charging the Pinkerton rule, as I said.

What do you say, Mr. Wilson?

MR. WILSON: First of all, we don't agree the conspiracy ended March 23rd. I think there is evidence from which the jury may infer, because of the continuing relationship in sharing the billing of Dr. Napoli until September '71, plus the fact, for some reason which is not clear in the record, Dr. Kavaler continued to leave Dr. Ingber in the checking account until almost a year later, that it is not clear the conspiracy ended March 23rd.

THE COURT: When it ended is a question for the jury and I am not attempting to preempt that question. It is not part of the essential theory in this case that these particular crimes in the substantive counts were committed in furtherance of the conspiracy and I am willing to tell them that.

MR. WILSON: Your Honor, I think the jury

may properly infer from the substantive acts evidence of defendant's state of mind as to the conspiracy.

THE COURT: They can infer state of mind --

MR.WILSON: These are similar acts --

THE COURT: His state of mind, based on the entire trial record. There is no need to belabor that question.

I urge you both to keep it simple and help me to keep it simple.

MR. WILSON: I had planned on pointing out to the jury that the Lee Avenue clinic had nothing to do with the conspiracy, but, however, they may infer from defendant's actions at Galler that he was in a conspiracy as charged with Ingber and Styles whenever it may have been and that he entered into this pattern of conduct --

THE COURT: If they believe the testimony of Vetrano and Cupola, Styles and Ingber, why do you have to get into involved discussions of prior or subsequent similar acts?

MR.WILSON: I don't intend for the discussions to be involved, your Honor, but, on the other hand, I think it would be unfair to limit the government's argument on that. I think it is fair argument.

THE COURT:I will tell them it is not necessarily so nor does it have to be shown that any substantive

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count was committed in furtherance of th conspiracy and if the conspiracy ended it couldn't have been in furtherance of the conspiracy.

I think that is fair.

(Continued on next page.)

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1B MR. WILSON: That is correct, your Honor, we don't contend you have to prove a substantive count to prove the conspiracy. As a matter of fact, I think the charge will be that we don't have to prove even that the conspiracy is successful, just the going forward, but I still want to comment on the fact that they can infer from the testimony of patients what Kavaler's course of conduct was even prior to that time. I think that is fair argument.

THE COURT: All right. Bring in the jury and start.

(Jury present.)

THE COURT: Good morning, members of the jury.

Mr. Wilson, you may make a closing argument for the government.

MR. WILSON: If it please the Court. Mr. Esbitt, Mr. Foreman, Ladies and Gentlemen of the Jury:

As I stated at the outset, in our opening statement, the government has now the opportunity to comment on the evidence and suggest the conclusions you may draw from the evidence.

Mr. Esbitt will respond to my argument and I will have an opportunity to respond to his argument and I am sure Mr. Exbitt will point this out to you, that

problems, that they really did that in order to appease the government. In this day and age I think you can find that that is not the case.

The very key to Dr. Kavaler's defense, to justify or corroborate his testimony that allthese treatments were his patient records, which Mr.Esbitt has there and which he will show you. Recall, if you will, that Dr. Martin testified that he saw Dr. Kavaler at one time sitting in an office with a pile of patient records and a pile of invoices and he was writing this paper, he just got out of factor and wanted to make money, and I suggest you may find, with little problem on this record in this trial, that everytime Dr. Kavaler wrote one of these false invoices he also wrote the patient record, which he testified as his private record, that he kept that just for a day like today, and that I think you may find is nothing more than bootstrapping.

I asked him a couple of times, "Are these invoices as accurate as your patient records?"

"Yes."

"Are your patient records as accurate as your invoices?"

"Yes, they are."

"Were written at the same time."

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You recall the book for Lee Avenue, Defendant's Exhibit AC, which was apparently lost from the first subpoenas, January, 1972, December, 1974, and found some time after that and was not turned over with a subpoena back in July because Dr. Kavaler made the decision this didn't apply to patients.

What do we have? We have a book which has patients which begin on February 10, 1971, and end on May 27, 1971. The counts begin March 31, 1971, and end on May 7, 1971. Dr. Kavaler testified when he was asked why was this so short that, well, he didn't work at Lee Avenue after May of 1971.

You heard the testimony of Dr. Alizadeh and his secretary, Mrs. Silva, they were receiving rent payments from him as late as January, 1974, and it was their best recollection that he worked there as late as December, 1973, and Mr. Esbitt has suggested to you, and will doubtless continue to suggest, that Dr. Kavaler was making rent payments for other people because he had these relationships with them where they were working for him really.

Also in evidence are the rent pages from these other doctors and you may inspect them and compare the dates and you may find from looking at these that they all made their own rent payments and the rent payments on Dr.

Kavaler's sheet are Dr. Kavaler's rent payments because he worked there until late 1973. There is evidence of Dr. Kavaler's attempt to falsely explain why this record ends just a month -- less than a month -- after the last substantive count in the indictment.

history card for every patient he ever treated, every one, he has produced in evidence a cast history for every invoice charged in this indictment. They are in evidence and you are free to see them.

These records could not possible have been falsified by the defendant for this trial and the government has failed to prove that they are false, although Mr. Wilson has suggested -- he suggested to cover himself back in 1969, '70, '71 anticipating the possibility of a criminal charge, he schemed that far back, and I say that that too is fantasy and not in accordance with the facts but just a conjecture on the part of Mr. Wilson and not borne out by the facts.

In addition, the defendant produced medical records. These are not his records, things that he writes up not n his handwriting, but medical records by doctors who serviced in the various medical centers and, heaven knows, those doctors are not on trial, I don't know -- certainly those doctors did not falsify records going back to 1969, '70 and '71.

Let me talk about this record of which the government has made a big fuss, said it looks practically new, it was probably written up last week or last month for the trial, a few months perhaps. Aside from the appearance of

the book and aside from your examination of it, the government has had an opportunity, brief, not too long a time -- they have had it available to them and they could have had expert testimony, not your testimony or mine, I couldn't tell you whether or not this was prepared last year, two years ago or five years ago, or 1971 -- I can't tell you that. That requires expert testimony and none has been produced.

Let me tell you something that common sense will tell you whether or not the government had an opportunity to challenge the veracity of this-- common sense, that is all we ask of you in deciding this case. You had Dr. Alizadeh on the witness stand and he introduced certain records and he was unsure whether or not the payments he got were for Dr. Kavaler for his services while working at Alizadeh's clinic or somebody else's services. He had an arrangement with the doctors to supply chiropractic, and he had that arrangement and payment was made by the doctor, and sometimes, as Dr. Alizadeh testified, if the doctor's didn't pay the money they were supposed to, he look to him for payment and he got it.

I asked Dr. Alizadeh "Can you state honestly on this witness stand that Dr. Kavaler did not work beyond 1971" and he said "No, I can't."

Then Mrs. Silva got on the witness stand and,

lo and behold, she testified "Oh, yes, he did work after 1971."

She testified "I think in 1973, but definitely in 1972."

So Mr. Wilson says "What better proof do you need that this is a fictitious record? Where is the record for 1972 and 1973?"

I tell you Mr. Wilson has the proof of 1972 and '73 in his files, or rather in the absence of his files, and this is what I mean:

If Dr. Kavaler had worked at Lee Avenue in 1972 and 1973 and submitted invoices, where are the invoices? Why didn't the government produce them? They didn't have to prove whether the invoices were false or not because the issue at this point is the crediblity of Dr. Kavaler. Why weren't these invoices presented?

All Mr. Wilson had to do was go through his voluminous files here and in his office and pull out of the files 1, 2, 5, 10, I don't know how many he has, of Dr. Kavaler's invoices at Lee Avenue in '72 and '73, because this girl said he worked in '72. Why weren't they presented here? I will tellyou why:

They were not presented because they didn't exist, otherwise they would have been presented. The

records showing invoices of Dr. Kavaler for 1972 did not exist and the government could not produce them and they did not exist becuase Dr. Kavaler did not work there in 1972 and only worked for this period of time. (indicating)

We offered in evidence on behalf of the defendant a lot of records and I will remind you that the piling up of records, where we have a hundred and they have 200, didn't mean a thing. It isn't the piling up of records that means anything, it is the meaning of the records, the significance of them. I told you and Dr. Kavaler testified that he prepared a case history card for every singl patient he had. I don't know how many there are, a hundred or more or less, it doesn't matter -- case history cards, originals, and copies we gave to the government, every single patient that Dr. Kavaler treated, and that evidence is available for your consideration.

Now we come, as you probably are waiting to hear, what about Dr. Kavaler? So far I have not mentioned his name except in connection with the other people. What kind of a man is Dr. Kavaler? I described him briefly to you in the opening remarks, but that was just my description of him. Now you have had an opportunity to see him, to hear him, to hear him on direct examination, hear him on cross examination, and these that -- well, let's find out

AFTERNOON SESSION

2:10 p.m.

(In open court; jury present.)

CHARGE OF THE COURT

(Brieant, J.)

THE COURT: Good afternoon, members of the jury.

Mr. Silver, members of the jury, we are now at that stage in the trial where you will soon undertake your final function as jurors, and here you perform one of the most sacred obligations of citizenship, and that is acting as ministers of justice.

You are to discharge that final duty in an attitude of complete fairness and impartiality, as I emphasized when you were first selected, without bias or prejudice for or against the government or the defendant as parties to this controversy.

Let me state the fact that the government as a party entitled it to no greater consieration than that accorded to any other party to a litigation, and by the same token, it is entitled to no less consideration. All parties, individuals and government alike, stand as equals

beforethe bar of justice in this court.

Your final role here is to decide and pass upon the fact issues in the case. You are the sold and exclusive judges of the facts, you determine the weight of the evidence, you appraise and decide the credibility, or truthfulness, of the witnesses, and you draw the reasonable inferences or conclusions from the evidence and you resolve such conflicts as there may be in the evidence.

I will later tell you how you determine the credibility of witnesses. My final function here is to instruct you as to the law and it is your duty to accept my instructions as to the law and to apply them to the facts of the case as you may find them to be.

You are not to consider any one instruction which I give you alone as stating the law, but you must consider all of my instructions taken together as a whole.

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that the lawyers either for the government or the defendant may have said with respect to matters in evidence, whether during the trial, in a question, in argument or in summations is not to be substituted for your own recollection of the evidence. So too anything I might say during the trial or anything I might refer to during the course of

these instructions as to any matter in evidence is not to be taken in place of your own recollection of the evidence.

The attorneys in the case not only have their right but it is their duty to make objections and to press whatever legal theories they may have. They are simply performing their duty. Any evidence as to which an objection was sustained by the Court and any evidence ordered stricken out by the Court must be disregarded in its entirety.

Please put out of your mind any exchanges which may have occurred during the trial between any lawyers or between any attorney and the Court. It is not my function to favor one side or the other or to criticize anybody in any way whatsoever or to indicate to you, the jury, in any way that I have any opinion as to the truthfulness of any witness or as to the guilt or innocence of the defendant. That is your function. It is yours alone to decide and I leave it entirely to you. So please don't assume that I hold any opinion in any matters concerning this case and please don't reach any conclusion that I may have some attitude or that I may tend to favor one side or the other in the case; I do not.

Of course, as I told you at the beginning, the

indictment itself is no evidence of the crimes charged. Instead, an indictment is merely the method or procedure under the law whereby a person accused of crimes by a grand jury is brought into this court to have his case determined by a trial jury such as yourselves and therefore the indictment must be given no evidentiary value but shall be treated by you only as an accusation. It is not evidence or proof of the defendant's guilt and no weight or significance whatsoever is to be given to the fact that an indictment has been returned against the defendant. He has pleaded not guilty and thus the government has the burden of proving the charged beyond a reasonable doubt.

A defendant doesn't have to prove his innocence. On the contrary, he is presumed to be innocent of the accusation contained in the indictment. This presumption of innocence was in his favor at the start of the trial as I believe I told you before and it continued in his favor throughout the entire trial and it is in his favor now and remains in his favor during the course of your deliberations in the jury room, and the presumption of innocence is removed only if and when you, the jury, are satisfied that the government has sustained its burden of proving the guilt of a defendant beyond a reasonable doubt.

Of course, unless you are so convinced you must

find him not guilty.

Now, the question naturally comes up, what is a reasonable doubt? These words almost define themselves, that is, a doubt founded on reason, arising out of the evidence in the case or the lack of evidence. It is a doubt which a reasonable dperson has after carefully weighing all the evidence. Reasonable doubt is a duty that appeals to your reason, to your judgment, to your common sense and your human experience; it is not caprice or whim or speculation or conjecture or suspicion, it is not an excuse to avoid the performance of an unpleasant duty and it is not sympathy for a defendant. If after a fair and impartial consideration of all the evidence you can candidly and honestly say you are not satisfied of the guilt of a defendant, that you do not have an abiding convictio of the defendant's guilt on a particular charge, in sum, if you have such a duty as would cause you as prudent persons to hesitate before acting in matters of importance to yourselves, then you have a reasonable doubt and in that circumstance it is your duty to acquit.

On the other hand, if after such an impartial and fair consideration of all the evidence you can candidly and honestly say you do have an abiding conviction of the defendant's guilt on any particular count in the indictment,

such a conviction as you would be willing to act upon in the important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt and under those circumstances it is your duty to convict as to that particular count that you are then considering.

Reasonable doubt doesn't mean a positive certainty or beyond all possible doubt. If that were the rule, few men, however guilty they might be, would ever be convicted because it is practically impossible for a person to be absolutely and completely convinced of any disputed fact which by its nature is not susceptible to mathematical certainty. For that reason the law in a criminal case that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

The weight of evidence, members of the jury, is not necessarily determined by the number of witnesses who testify or the number of documents introduced by either side. Rather, it is whether the evidence that has been introduced is such as to convince you of a particular element of the charge you are then considering beyond a reasonable doubt. You may find that the testimony of a smaller number of witnesses on one side is more credible and lays heavier on your mind than the testimony of a greater number of witnesses on the other side. What you are to

consider is the weight and significance of the evidence and not merely the number of witnesses or the number of documents.

The indictment in this case, members of the jury, now contains 16 counts and each count accuses Dr. Max Kavaler of a separate crime and they must each be considered separately and you will give or be asked to give separate verdicts as to each of the remaining open counts.

Counts 28, 31, 32, 35, 36, 37, 41, 42, 44, 45, 47, 48, 51, 52 and 53 as well as Counts 3, 4, 7, 8, 12, 13, 14, 17, 20, 23, 24, 29, 30, 33, 34, 38, 39, 40, 43, 46, 49 and 50, which I previously withdrew the other day, are no longer before you for your decision. As to those counts which do not remain before you, you must not speculate or engage in any discussion or conjecture about why this is so or what reasons I may have for any rulings which I have made with respect to these matters, which are solely legal questions, and the fact that counts were asserted and have been removed from the case has nothing to do with your decision about the counts that remain for verdict.

Dr. Kavaler is the only defendant and the only person with respect to whom you will be asked to announce your verdict, although as I will explain to you shortly, in considering his case you may have to determine the

nature of the participation or activities, if any, to the extent knownto him, of Dr. Ingber and Dr. Styles and some of the others who have been mentioned, but in determination of whether guilt is proved beyond a reasonable doubt, you must bear in mind that guilt is personal and individual. The case of a defendant on trial before you must be determined solely with respect to him, solely on the evidence presented against him or the lack of evidence and not on the evidence as to what somebody else did.

For your guidance in considering evidence, I must tell you there are two classes of evidence recognized and admitted in the courts of justice upon either of which the jurors may find an accused guilty of a crime. One is called direct evidence and the other is called circumstantial evidence. Direct evidence tends to show the fact in issue without the need for any other amplification, although of course there is always the question whether it is to be believed, circumstantial evidence is evidence that tends to show facts from which the fact in issue may reasonabley be inferred or a conclusion reached. It is evidence which tends to prove the facts in issue by proof of other facts which have a legitimate tendency to lead the mind to infer or conclude that the facts sought to be established are true. There is a traditional example.

You all know that sometimes it is difficult, if you are in a tall building like this, to look out the window and tell merely by looking out the window whether it is raining or not, but if you look out and you see people passing by in the streets and they have their umbrellas up you will usually come to the conclusion it must be raining. You have your direct evidence, the evidence of your own senses and you can see the umbrellas are up and that fact, that the umbrellas are up, constitutes circumstantial evidence from which you may conclude that it must be raining. In other words, circumstantial evidence consists of facts proved from which the jury may infer, from a process of reasoning, other facts in issue. And circumstantial evidence if believed is of no less value than direct evidence, for in either case you must be convinced beyond a reasonable doubt of the guilt of a person before he may be convicted of any crime.

In determining what evidence you will accept as true, you must make your own evaluation of the testimony given by each of the witnesses and determine what you believe to be the truth and the degree and weight that you choose to give to that testimony. The testimony of a witness may fail to conform to the truth because the witness is intentionally telling a falsehood or because the witness did not accurately see or hear what he or she testified about

or because his or her recollection of the event is faulty or because he has not expressed himself clearly in giving testimony. There is no magic formula by which you evaluate testimony. Each of you brings to the jury room all of the experience and backgrounds of your lives. In your every day affairs each of you determine for yourselves the reliability of statements made to you by other people. The same tests you use in your every day dealings are the tests which you will apply inyour deliberation. You may of course consider the interest or lack of interest of any witness in the outcome of the case. A witness who is interested in the outcome is not necessarily unworthy of belief but interest is a factor or possible motive that you may consider in determining the weight and credibility to be given to the witness' testimony.

In doing this you may also consider whether the testimony of a witness is corroborated, or borne out, by the testimony of other witnesses whom you believe, or by documentary evidence or by exhibits.

You may consider and observe the manner in which the witness gives his testimony on the stand, the appearance and conduct of the witness in giving his testimony, the opportunity the witness had to observe the facts concerning which he or she testifies, and the probability

or improbability of the testimony in light of all the other events of the case.

You may also consider whether a witness had any motive to lie. These are all items to be taken into your consideration in determining the truthfulness and weight, if any, which you will assign to that witness' testimony. If these considerations make it appear there is a discrepancy in the evidence, you will have to consider whether this can be reconciled by fitting the conflicting testimony together and if that is not possible, then you will determine which of any conflicting versions you will accept as true.

In this, as in all of your work as jurors, you use your common sense. Now, a word about the testimony of Dr. Ingber and Dr. Styles and Dr. Martin and Dr. Krieger and probably Mrs. Vetrano and Mrs. Cupola, who were called by the government as witnesses at the trial. By their own testimony, these people appear to have been accomplices in the crime charged against Dr. Kavaler in Count 1 of this indictment, the so-called conspiracy count.

In the prosecution of crime the government is often called upon to use accomplices as witnesses. Of course, the government must rely on such witnesses as there are or may be to any criminal transaction. It is not frequent that people with impeccable reputations are

witnesses to or participants in criminal endeavors. There is no requirement in the federal court that the testimony of accomplices be corroborated. A conviction may rest upon the uncorroborated testimony of an accomplice if you believe it and find it credible. The fact that a witness may be an accomplice should be considered by you as bearing on his or her credibility. It doesn't follow that because a person acknowledges participation in a crime he is not capable of giving a truthful version of what he testified to. The testimony of an accomplice, however, should be viewed with great caution and scrutinized carefully. You should examine whether the testimony of any of them was inspired by a motive of reward or self-interest or hostility to the defendant, or anything else, so that any of them gave false testimony in this trial. You may consider these factors involving the testimony of accomplices in addition to all the other considerations regarding the credibility of witnesses generally in determining what weight, if any, to give to their testimony.

Also, the testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony, that is, of a crime punishable by imprisonment for a term of one year or longer. You will recall in their testimony Dr. Ingber, Dr. Styles and Dr. Martin admitted that they have each pleaded guilty to the commission of one or more felonies.

These crimes do not render any witness incompetent to testify, but it is one of the variety of circumstances you may consider in determining what weight to give to their testimony. Merely because a witness has been convicted of a felony does not mean that his testimony is unworthy of belief, but you may consider this prior criminality in determining whether the witness is a truthful witness whose testimony is entitled to any weight. Perhaps I forgot to mention Dr. Krieger. He also had a felony conviction and the same statements I just made apply to him also.

The law permits a defendant upon his request to testify in his own behalf and the testimony of the defendant, Max Kavaler, is before you and you must determine how far the deep personal interest every defendant has in the result of his case should be considered in determining the credibility of his testimony. You are instructed

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that interest may create a motive for false testimony and the greater the interest, the stronger is the temptation and that the interest of a defendant is of a character possessed by no other witness and therefore is a matter which may affect the credence which should be placed on that testimony. However, that is also a matter entirely for you to determine, using your own common sense and considering all the evidence in the case.

If any witness is shown to have knowingly testified falsely concerning any material matter in a trial, you have a right to distrust such witness's testimony in other particulars and you may reject all of the testimony of that witness or give such parts of it such credence as you think it deserves. An act or omission such as testifying falsely is knowingly done if it was done voluntarily and intentionally and not because of a mistake or accident or some other innocent reason.

Now, a word about the testimony you heard concerning the previous excellent character and reputation of this defendant. Good character and reputation is to be weighed as a factor in a defendant's favor and you should consider it together with all the facts and circumstances before you and then give it such weight to which you think it is entitled. A defendant's reputation

for good character may, like other factors in his favor, generate a reasonable doubt as to his guilt. On the other hand, if on all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty, a showing that he previously enjoyed a reputation for excellent character does not justify or excuse the crime. You should not acquit a defendant merely because you believe that the defendant is a person of good reputation or character if you are otherwise satisfied beyond a reasonable doubt as to his guilt. Whether the government has satisfied the burden of proving guilt beyond a reasonable doubt is for you and you alone to determine and theopinion of any of the witnesses as to that matter is not binding on you.

With respect to this indictment, the first count of the indictment, Count 1, I will refer to as the conspiracy count. I do that simply to keep it straight in your minds. The remaining counts, each of which charges a separate substantive violation of a Federal statute, I will refer to as the substantive counts. Each count charges a separate crime and you will be asked to render a separate verdict as to each count and it is important that you keep each count separate and distinct in your minds and decide each count separately.

Now I will read Count 1 of the indictment, together with some preliminary paragraphs in the indictment:

"The Grand Jury charges:

"1. On July 30, 1965, Title XIX of the Social Security Act (the 'Medicaid Act') was enacted creating the Medicaid program.

"2. Pursuant to the Medicaid Act, the United States Department of Health, Education and Welfare shares with each state the cost of medical services to families with dependent children and to aged, blind or permanently and totally disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services.

"3. The Medicaid program further provides for rehabilitative and other services to help such families and individuals attain or retain capability for independence and self-care.

"4. Pursuant to the Medicaid Act each state must promulgate a plan for Medicaid assistance.

"5. On May 1, 1966, the State of New York enacted a statewide medical plan in accordance with the provisions of the Medicaid Act.

"6. The New York State Social Welfare Law

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vests responsibility for the medical assistance program within New York State and the State Department of Social Services.

"7. The Department of Social Services of the City of New York, located at 330 West 34th Street in Manhattan, processes and pays claims by various providers for Medicaid services rendered within New York City. The nature and amount of all such claims is reported monthly by New York City ro the New York State Department of Social Services.

"8. The New York State Department of Social Services submits quarterly to the Department of Health, Education and Welfare a sreport detailing the nature and amount of such claims.

"9. The Department of Health, Education and Welfare reimburses federally qualified claims at the rate of fifty cents on each dollar paid by the State of New York.

"10. At all times material herein Max Kavaler, the defendant, was licensed by the State of New York as a chiropractor and certified by the City of New York as a Medicaid provider.

"11. At all times material herein Max Kavaler, the defendant, was an owner or had a financial interest

in or was affiliated with the following medical office and clinics, 91-24 168th Street, Jamaica, New York; Corona Medical Center, 105-05 Northern Boulevard, Corona, New York; and Galler Medical Center, 858 Flushing Avenue, Brooklyn, New York. The business of said office and clinics was to provide health-care services to Medicaid-eligible patients."

That is the end of the introduction.

Count 1.

"The Grand Jury further charges:

"12. From on or about January 1, 1969, up to and including December 31, 1972, in the Southern District of New York and elsewhere, Max Kavaler, the defendant, and Joseph Howard Ingber and Sheldon Max Styles, named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with persons to the Grand Jury known and unknown, to defraud the United States and its departments and agencies in connection with the performance of their lawful governmental functions by obstructing and hindering the Department of Health, Education ahd Welfare in administering the

the Medicaid Act and to violate Title 18, United States Code, Section 287.

"13. It was part of said conspiracy that the defendant and his co-conspirators would and did agree to defraud the United States of its lawful right to have the United States Department of Health, Education and Welfare reimburse the State of New York as provided in the Medicaid Act fairly and impartially, without undue influence, unlawful inducement, false representation, favor or fraud, by causing the State of New York to file claims for reimbursement under said Medicaid Act which were based in part upon Invoices for Doctor's Services and other documents, which were false, fictitious and fraudulent in material respects.

"14. It was further a part of said conspiracy that the defendant and his co-conspirators unlawfully, wilfully and knowingly would and did make and cause to be made false claims upon and against the Department of Health, Education and Welfare, an agency and department of the United States.

"15. It was further a part of said conspiracy that the defendant and his co-conspirators, in matters within the jurisdiction of a department and agency of the United States, that is, the United States Department

of Health, Education and Welfare, unlawfully, wilfully and knowingly would and did falsify, conceal and cover up, and would and did cause to be falsified, concealed and covered up by trick, scheme and device material facts and would and did make and use and cause to be made and used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries.

"16. It was further a part of said conspiracy that the defendant and his co-conspirators unlawfully, wilfully and knowingly would and did devise a scheme and artifice to defraud the City of New York, the State of New York and the United States Department of Health, Education and Welfare and to obtain money by false, fictitious and fraudulent pretenses and representations and for the purpose of executing said scheme would and did place and cause to be placed certain documents in authorized depositories for mail and caused them to be delivered to the Department of Social Services of the City of New York and elsewhere.

"17. Among the various means whereby the defendant and his co-conspirators would and did carry

out the objects of said conspiracy were the following:

"(a) Defendant and his co-conspirators would and did employ doctors (both general practitioners and specialists), chiropractors, optometrists, dentists, and podiatrists to work in said clinics.

"(b) Defendant and his co-conspirators, would and did encourage the Medicaid providers to factor their Medicaid invoices for Doctors Services.

"(c) The factor would charge the Medicaid providers between 10% and 12% for his services. A percentage of the factor's fee would be kicked back to defendant's co-conspirators.

"(d) Said Medicaid providers would and did pay from 10% to 75% of the proceeds received from the factor to the clinics and to the defendant and his co-conspirators.

"(e) When a patient would appear at a clinic, his or her Medicaid identification card would be photocopied, a file begun and the names and ages of all Medicaid-eligible family members would be recorded."

"(f) Defendant and his co-conspirators would

and did cause many patients to see other Medicaid providers in the clinic without regard to the patient's actual health needs.

"(g) Defendant and his co-conspirators would and did take and cause to be taken as many blood samples as possible from clinic patients without regard to medical necessity. Said blood samples were sent to a medical laboratory for analysis. The laboratory would and did bill Medicaid for each test performed and would and did kick back from 18% to 22% of such gross receipts to defendant's co-conspirators. In addition, said laboratory would be required to pay in whole or part salaries of some of the employees who worked in said clinics.

"(h) Defendant and his co-conspirators in many instances would and did see and cause to be seen each patient regardless of his actual health need and prepare and cause to be prepared Invoices for Doctors Services.

"(i) Defendant and his co-conspirators in many instances would and did add and cause to be added to Invoices for Doctors Services additional fictitious visits and treatments to actual visits

and treatments.

"(j) Defendant and his co-conspirators in many instances would and did prepare and cause to be prepared Invoices for Doctors Services for patients never actually seen or treated.

"(k) Defendant and his co-conspirators would and did prepare and cause to be prepared false, fictitious and fraudulent Chiropractic Treatment Plans for patients who wwre either never seen or diagnosed or did not require the proposed treatment detailed therein.

"l) Defendant and his co-conspirators would and did submit and cause to be submitted and did mail and cause to be mailed said Invoices for Doctors Services and Chiropractic Treatment Plans to the Department of Social Services of the City of New York, which would then pay the amount claimed in said invoices. The proceeds of these claims were then shared among defendant and his co-conspirators.

"OVERT ACTS

"In furtherance of the said conspiracy and to effect the objects thereof, the defendant and his co-conspirators committed the following overt acts, among others, in the Southern District of New York and else-

where" and thereafter it continues to list two overt acts, and I will read those to you in just a few moments.

The defendant is charged in Count 1 with violating Section 371 of Title XIX of the United States Code, and I will read you the important part of that statute. It is not necessary for you to remember the numbers but it is essential that you understand what the statute provides, and it reads in part as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or for any purpose and one or more of such persons do any acts to effect the object of the conspiracy, all such persons have committed a crime."

Count 1, which I just read to you, charges that the unlawful object or the goal that the alleged conspiracy was designed to achieve was to defraud the United States and to violate Section 287 of Title XVIII of the United States. Defrauding the United States, as used in this statute, is not restricted to obtaining money fraudulently, although it is the government's contention that this was the principal object of this conspiracy. The term "defrauding the United States" also includes interfering with, obstructing or depriving the government

of one of its lawful administrative functions by deceptive or dishonest means. The government has the right to have the expenditure of its funds in the Medicaid Program conducted free from fraud, deceit, misrepresentation, concealment, interference, or obstruction. Thus the term "conspiracy to defraud the United States" is an allegation that the defendant conspired to furnish false information to and withhold truthful information from the Department of Health, Education and Welfare.

The defendant is also charged in Count 1 with conspiring to violate Section 287 of Title 18 of the United States Code, which makes it a crime for anyone to make a false claim for money upon or against the United States.

In order to convict the defendant of the crime charged in Count 1, you must find that each of the following three elements have been proved beyond a reasonable doubt -- each one beyond a reasonable doubt. These are the three elements of Count 1, and this is very important to be remembered: first, that the conspiracy charged in Count 1 did in fact exist, that is, that two or more persons agreed to defraud the United States or to violate the law against making false claims for money upon or against the United States.

Second, that this defendant knowingly and wilfully associated himself with the conspiracy, that is, he became a member of it, and the third is that at least one of the co-conspirators committed in the Southern District of New York at least one of the overt acts set forth in the indictment at or about the time and place set forth.

I am going to discuss each of these three elements with you one at a time. The first element of Count 1 you must determine is whether the conspiracy charged in this indictment did in fact exist. As you go through these elements, if you find as to any single element that the government failed to prove that element beyond a reasonable doubt, then you cease your deliberations on Count 1 because under those circumstances the defendant must be acquitted and then you go on and consider the substantive counts because every element of the three must be proved beyond a reasonable doubt.

Now, the first element is whether the conspiracy charged in this indictment did in fact exist.

Well, what is a conspiracy? A conspiracy is a combination or agreement of two or more persons by concerted action, each in his own way and to his extent, to accomplish a criminal or unlawful purpose.

The gist of the crime of conspiracy is the unlawful combination or the joint agreement of two or more persons to violate the law together.

Conspiracy has sometimes been called a partnership for criminal purposes in which every partner becomes the agent of the other partner. Like in all partnerships, there can be principal partners and junior partners. However, to establish a conspiracy, the government is not required to show that two or more persons sat down around a table and entered into a solemn compact, orally or in writing, stating they had formed a conspiracy to violate the law, or setting forth the details of their plan or the means by which the unlawful project is to be carried out or specifying the part to be played by each conspirator.

Indeed, it would be extraordinary if there was such a formal agreement or a specific oral understanding. Your common sense will tell you that when men

in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding.

Conspirators do not usually reduce their agreements to writing or acknowledge them to outsiders. By its own nature, conspiracy is almost always characterized by secrecy, rendering it difficult to detect.

Thus, it is sufficient if two or more persons in any manner, through a contrivance, impliedly or tacitly, come to a common understanding to violate the law together. Express language or specific words are not required to indicate the formation or the assent or attachment to a conspiracy.

Now, as I mentioned to you a moment ago, the gist of the crime of conspiracy is the unlawful combination or agreement to violate the law together. The offense is complete when the unlawful agreement is made by two or more people and any single overt act to effect the object of the conspiracy is thereafter committed by at least one of the co-conspirators.

The government need not prove that the conxpiracy achieved its goal. However, proof concerning the accomplishment of the objects of a conspiracy may be the most persuasive evidence of the existence of the conspiracy itself. Successful venture, if you believe it

was successful, may be regarded as proof of the existence of the agreement.

In this regard, I caution you that those substantive counts concerning claimed false invoices at Lee Avenue, that is, Counts 15 and those with numbers higher than 15, are not related to or claimed to be in furtherance of the conspiracy charged in Count 1. Also, if the conspiracy, if there was one, ended on March 23, 1971, then the substantive counts numbered between 2 and 14, inclusive, were not in furtherance of or related to the alleged conspiracy. There is no need for the government to show any relationship between the substantive charges and the conspiracy. Each count, as I said to you earlier, must be treated as a separate matter, to be separately decided by you and there may be no conviction on any count unless as to that count each element of the alleged crime is proved to your satisfaction beyond a reasonable doubt. But, unless the evidence indicates that the conspiracy continued beyond March 23, 1971, you cannot consider the Galler Medical Clinic substantive counts as bearing directly on the conspiracy or the furtherance of it. As to Lee Avenue counts, you may not consider them as being in furtherance of the conspiracy.

Now, the defendant contends that the government has failed to prove the existence of the single conspiracy alleged, and at best, or viewed most favorably to the government, the evidence shows the existence of several, separate and independent conspiracies involving various persons, including the defendant.

Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. Unless it is, it is your duty to acquit on Count 1.

If youare satisfied beyond a reasonable doubt that the single overall conspiracy as alleged in the indictment existed, you will then go on to determine whether the defendant, Max Kavaler, joined the conspiracy during the time of its existence and whether he did so with knowledge of its unlawful purposes.

In determining whether this defendant was a participant or a member, he is entitled to individual consideration of the proof respecting him, including all evidence of his knowledge or lack of knowledge, his status as a partner, supervisor or employee, his participation or non-participation in key conversations and his activities,

if any, in the alleged plan, scheme or agreement to defraud the United States or present false statements for payment by the United States.

The guilt of a conspirator is not governed by the extent or duration of his participation in the conspiracy, or whether he had knowledge of all of its operations. Even if one joined a conspiracy after it was formed and engaged in it in a more limited degree than the other co-conspirators, he is equally culpable, so long as he was a co-conspirator. Each member of a conspiracy may perform different, separate acts at different times and different places, and some may play major roles while others have minor parts.

It is not required, in order to convict a defendant of the crime of conspiracy, that he be a member of the conspiracy from its very start: he may join in it at any point during its progress. He will then become responsible for all that may be done thereafter during its existence while he remains a member. Simply stated, using the partnership analogy again, by become a partner he assumes all the liabilities of the firm.

There is no requirement that all the conspirators have acted together at any one time or place. You may consider the fact that certain patients were claimed

to have been seen at Jamaica Clinic and others at Galler and others at different addresses in determining whether the single conspiracy charged in Count 1 existed. The mere fact that patients were seen at different clinics and that the several clinics were supervised at different times by different doctors, does not mean that there was not a single overall conspiracy.

In determining whether the conspiracy charged in Count 1 existed, you may consider all of the surrounding circumstances as shown by the evidence in this case. The factual determination, members of the jury, and like all factual determinations, it is a matter entirely for your sole consideration and determination.

The indictment here charges the duration of the conspiracy was from on or about January 1, 1969, up to and including December 31, 1972. However, there is evidence that the conspiracy, if it did exist, ended on or about March 23, 1971. Because after that date, Dr. Ingber and Dr. Styles were no longer connected with the Galler Medical Clinic. That's a matter which is disputed, but there is evidence which the jury may consider to that effect. It is sufficient if the conspiracy be proved beyond a reasonable doubt to have existed during the period set forth in the indictment and it need not be shown to have

existed for that entire period.

Now, as I mentioned earlier, the second element of Count 1 which must be proved beyond a reasonable doubt, assuming you find the first element has beensatisfied, that Dr. Max Kavaler was a knowing and wilful member of the conspiracy, if you conclude that a conspiracy as charged in Count 1 existed, then you must determine whether he became a member of it. That is, whether he participated intentionally in the conspiracy, with knowledge of at least some of its unlawful purposes and in furtherance of its unlawful objectives. To find that the defendant was a member of the conspiracy, you must find that he knowingly and intentionally participated. Thus, mere knowledge by the defendant of the existence of the conspiracy or of any illegal act on the part of an alleged co-conspirator or his mere association with one or more co-conspirators is not sufficient to establish membership in the conspiracy. The government must establish beyond a reasonable doubt that this defendant was aware of the basic and unlawful purposes and objects of the conspiracy and that he entered into it with a specific criminal intent, that is, a purpose to violate the law. So, if the defendant understood the unlawful character of the conspiracy and intentionally engaged in actions or advised or assisted for the purpose

of furthering the illegal undertaking and made the conspiracy something he wished to succeed, then the jury may find that he is a knowing and wilful participant and a co-conspirator and a member of the conspiracy and the second element of Count 1 may be found to have been satisfied.

Here, again, though, I want to caution you that mere association with one or more of the alleged co-conspirators does not make one a member nor is knowledge of the existence of the conspiracy alone without participation sufficient to make one a conspirator.

To find that the defendant was a member of any conspiracy, you must first find that he acted knowingly and wilfully with the specific criminal intent to do an unlawful act together with at least one of the co-conspirators. I will discuss the meaning of those words with you at greater length in a few moments.

Now, assuming that you have found the conspiracy to have existed and you found the defendant to have participated knowingly in it and become a member in it, the extent of his participation has no bearing upon his culpability. Whether a defendant is a conspirator is not measured by the extent or even the duration of his membership in the conspiracy or the extent of the fruits of the

unlawful venture that he may have expected or received. Even if he participated in the conspiracy to a lesser extent or expected a lesser share of the success of the venture, he is equally culpable if you find that he was in fact a knowing and wilful conspirator.

Now, I instruct you that the words "knowingly and wilfully" mean deliberately and intentionally. In other words, you must be satisfied beyond a reasonable doubt that the defendant acted with knowledge, consciousness and in the exercise of free will. The words "knowingly and wilfully" are opposed to the idea of inadvertent or accidental occurrence. An act is done knowingly if it is done voluntarily and purposely and not because of mistake or accident or negligence or some other innocent reason. You must determine whether he acted knowingly and wilfully and with a requisite criminal intent, that is, intending to violate the statute prohibiting the submission of false claims or intending to defraud the United States and intending to do so in concert with at least one other co-conspirator. If you don't find that that was so, then the defendant must be acquitted on Count 1. Wilful does not mean that in addition to knowing what he was doing, the defendant must also suppose that he was breaking any particular statute.

Now, intent, ordinarily cannot be proved directly since it is not possible to look into somebody's mind and see what he was thinking a few years ago. The only way you have to determine the issue of intent is to consider all of the surrounding circumstances, including any written or oral statements which the defendant made or any acts which he did which are indicative of his state of mind at that time.

Now, in connection with some of these portions of Count 1 in the indictment which I read to you, I will instruct you that the government is entitled to set forth all of what it considers to be the objects or purposes of any alleged conspiracy when it submits a proposed indictment to the grand jury. In this case, matters such as ping-ponging and family ganging and using unnecessary laboratory tests have been set forth as part of the objects. With respect to Count 1 of this indictment, I instruct you that if you find that the purposes or objects of the conspiracy were solely to engage in the practices which have been described to you as ping-ponging or family ganging or doing unnecessary laboratory work or blood tests or the like, in order to get a share of the laboratory fee, if that's all that the conspiracy involved, then this defendant must be acquitted on Count 1. In order to convict this

defendant on Count 1, you must be satisfied beyond a reasonable doubt in addition to the other elements in this case which I have previously listed and mentioned to you in the finding of the question of a conspiracy, that the government has proved beyond a reasonable doubt that it was one of the objects of the conspiracy to file or cause to be filed false invoices which would describe medical treatment allegedly rendered in behalf of patients in the name of this defendant or the co-conspirators which treatments or visits in fact had not been rendered or had not taken place. That, members of the jury, is the gist of the conspiracy charged in Count 1. Unless it has been proved beyond a reasonable doubt that that was one of the objects of the conspiracy, your duty is to acquit on that count.

Now, I said to you the third element which must be proved in connection with Count 1 beyond a reasonable doubt is that at least one of the conspirators committed an overt act in the Southern District of New York as listed in the indictment. Now, I'll read those overt acts.

"1. During 1971, Max Kavaler had a conversation with another about Medicaid invoices.

"2. During 1971, Max Kavaler and others prepared and caused to be prepared diverse false

and fraudulent Medicaid invoices for Doctors Services and Treatment Plans and submitted and caused them to be submitted for payment and approval, as the case may be, to an office of the New York City Department of Social Services, 330 West 34th Street, New York, New York."

Those are the two overt acts.

Now, an overt act, o-v-e-r-t, is any step, action or conduct which is taken to achieve, accomplish or further the objective of a conspiracy. The purpose of acquiring proof of an overt act is that parties might conspire, plan and scheme and agree together to violate the law and then they may change their minds and do nothing to carry it into effect. In which event, it would only be be talk and would not constitute a crime. A mere agreement without an overt act is not a crime. But an overt act need not be a criminal act nor need it be the very crime which was the object of a conspiracy. It is notnecessary for the government to prove that each member of the conspiracy committed or participated in any particular overt act since the act of one done in furtherance of the conspiracy becomes the act of all the other members.

Also, the government is not required to prove each of the overt acts. It is sufficient, if it proves

the commission of at least one overt act in the Southern District of New York by one co-conspirator.

Now, you all know, I'm sure, that the Southern District of New York includes New York County, which we commonly call Manhattan. It does not include the Boroughs of Brooklyn and Queens. They are in the Eastern District of New York. The overt act need not have occurred at the precise time or place alleged in the indictment. However, the place of the overt act must be in the district. When I say district, I mean the Southern District.

Now, I'll leave the question of the conspiracy count or Count 1, and I will talk about the other counts. Count 2 and those following it, so-called substantive counts, each charge the defendant, Max Kavaler, alone, with having made or caused to be made false, fictitious or fraudulent crimes upon the United States Government or one of its departments. This part of the indictment reads as follows:

"18. That on or about the dates set forth below, Max Kavaler, the defendant, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly, engaged in a scheme and artifice to defraud the City of New York, the State of New York and the United States, whereby they would obtain

money by false, fictitious and fraudulent pretenses and representations. Said scheme is fully set forth in paragraphs 1 through 11 and 17 of this indictment which are repeated and realleged as if fully set forth herein.

"19. That on or about the dates set forth below, in execution of the aforesaid scheme and artifice to defraud, in the Southern District of New York, Max Kavaler, the defendant, unlawfully wilfully and knowingly did make and present, and cause to be made and presented to the United States Department of Health, Education and Welfare, a department and agency of the United States, for payment, certain claims upon and against the United States, to wit, various 'Invoices for Doctors Services,' which invoices contained certification that the services desdribed therein were furnished by him at certain times to certain Medicaid patients when in truth and in fact, as the defendant, Max Kavaler, then and there well knew said claims were false, fictitious and fraudulent in that some or all of the said services were not furnished by him."

Count 2, the date, March 31, 1971, the name, Beatrice Lee, Invoice No. M272614.

Count 5, the date, May 25, 1972, the name, Alberta Harris, the Invoice No. M272648.

Count 6, September 6, 1972, the name, Alberta Harris, the Invoice No. M272699.

Count 9, the date, August 16, 1972, the name, Rose Rodriguez, Invoice No. Y485813.

Count 11, Alice Rodriguez, August 16, 1972, Invoice No. &485805.

The Grand Jury further charges:

"20. That on or about the dates set forth below, Max Kavaler, the defendant, unlawfully, wilfully and knowingly, engaged in a scheme and artifice to defraud the City of New York, the State of New York and the United States, whereby he would obtain money by false, fictitious and fraudulent pretenses and representations.

"21. That on or about the dates set forth below, in execution of the aforesaid scheme and artifice to defraud, in the Southern District of New York, Max Kavaler, the defendant, unlawfully, wilfully and knowingly did make and present, and cause to be made and presented to the United States Department of Health, Education and Welfare, a department and agency of the United States, for payment,

certain claims upon and against the United States, to wit, various 'Invoices for Doctors Services,' which invoices contained certification that the services described therein were furnished by him at certain times to certain Medicaid patients when in truth and in fact, as the defendant, Max Kavaler, then and there well knew, said claims were false, fictitious and fraudulent in that some or all of the said services were not furnished."

Count 15, date, March 31, 1971, name, Rosa Echevarria, Invoice No. K890324.

Count 16, date, March 31, 1971, name, Maria Colon, Invoice No. K890326.

Count 18, date, March 31, 1971, name, Minerva Rodriguez, Invoice No. K890316.

Count 19, date, March 31, 1971, name, Rachel Expinosa, Invoice No. K890322.

Count 21, March 31, 1971, name, Luz Quinones, Invoice No. K890333.

Count 22, March 31, 1971, name, Jasmin Arroyo, Invoice No. K890327.

Count 25, date, May 7, 1971, name, Lucilda Creque, Invoice No. K890362.

Count 26, May 7, 1971, name, Ada Torres, Invoice

No. K890356.

Count 27, date, May 7, 1971, name, Carmen Irizarry, Invoice No. K890360.

Now, the indictment charges that each of these acts were a violation of Section 287 of Title 18 of the United States Code, the section I mentioned to you earlier. This provides in pertinent part, "Whoever makes or presents to any department or agency of the United States any claim upon or against the United States or any department or agency thereon, knowing such claim to be false, fictitious or fraudulent, commits a crime."

Now, in order to find the defendant guilty of any offense charged in any one of the substantive counts, the government must prove each of the following elements beyond a reasonable doubt as to the particular substantive count that you are then considering. I did mention to you earlier you will consider them separately. These elements are different and they are elements of the substantive counts.

First, the defendant, Max Kavaler, made or presented a claim to a department or agency of the United States Goverhment. Second, that the claim was made upon or against a department or agency of the United States government; here, the United States Department of Health,

Education and Welfare. Third, that the claim was false, fictitious or fraudulent and; fourth, that the defendant knew when he did so that his claim was false, fictitious or fraudulent.

The first element which the government must prove beyond a reasonable doubt is that the defendant made or presented a claim, the particular claim mentioned in the count you are then considering, to a department or agency of the United States Government. The government contends that the false claims that were submitted with certain forms entitled "Invoices for Doctors Services" completed for the treatment of each patient as alleged in the respective counts in the indictment. For our purposes here, you may consider a claim to include any voucher or document or other paper prepared or intended to be used or presented to procure the payment of money from or by the United States or any officer, employee or agent of the United States Government.

If you find that these invoices were claims, then you must consider whether the defendant presented these claims to a government agency. The government does not contend that Dr. Kavaler himself presented these claims to an agency of the United States Government. It's been stipulated between the parties that the ordinary means by

which these invoices were presented was first through the agency of the City of New York's Social Services Department. They were processed in accordance with the plan of the Medicaid Program for ultimate processing and payment by the United States Department of Health, Education and Welfare.

The law doesn't require that the defendant have committed every act that comprises the offense itself in order for him to have committed the crime charged here. You may find the defendant guilty of the crimes charged in these substantive counts if you find he aided and abetted the commission of the offense charged.

That statute pertaining to aiding and abetting which is Title 18, Secton 2, reads in pertinent part:

"Whoever wilfully causes an act to be done which if directly performed by him which wouldbe an offense against the United States, is punishable as a principal."

Thus, if you find that the defendant, Max Kavaler, caused the factor, or a secretary or a bookkeeper or some otherperson to present these claims to the City of New York in its office in the Borough of Manhattan for processing and presentation by that office as an agent of the United States Government for delivery and

payment, delivery to and payment by the Health, Education and Welfare Department of the United States Government and that the factor or the secretary or the bookkeeper or messenger or whoever did actually do so, then you may find that the first element of this crime is satisfied, if you are satisfied that this defendant had set in motion the activity by these other persons such as the factor, intending that the claim be presented by the factor for such processing and payment.

If, on the other hand, you are not satisfied beyond a reasonable doubt that he either presented the claim himself for payment to the Department of Social Services of the City of New York in Manhattan or that he caused somebody else to do so, that is to say the factor or the factor's employees, or somebody else, then you must acquit as to the particular substantive count then under your consideration. It is not necessary that the factor or any person who ultimately presented the claim to the City Department was aware that the claim was false if you find that the defendant cause a false claim to be made or presented in the first instance or by such person.

Now, the second element required is that the claim was made or presented against the United States

or department or agency thereof, and in this case the Department of Health, Education and Welfare. If you find that the claims once received by the New York City Department of Social Services as part of and pursuant to the Medicaid Program were Federally reimbursable claims which were reported by the New York State Department of Social Services and then on to the Department of Health, Education and Welfare of the United States, this element of the crime is satisfied.

The third element of the substantive counts of the claim which you are considering is whether they were false, fictitious or fraudulent. A statement if false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made. A statement is fictitious if it does not correspond to what actually occurred. In the context of the statute, that the persons making the statement knew that the statement did not reflect what actually occurred. A statement or claim is fraudulent if it was falsely made or caused to be made with the intent to deceive. There's been evidence in the case that certain invoices for doctors' services state that certain services were performed which in fact were not performed. If you find that services which were claims were not actually performed and that such claims were made intentionally and

not made through inadvertence or innocent mistake, then you may consider those claims to be false, fictitious and fraudulent.

A claim for purposes of this case may be regarded by you as false if you find that it significantly overstates the nature, extent or value of the services rendered, or if it states thereon a demand for payment for more visits or treatments for any particular named patient than the number of treatments or visits actually rendered by the provider of Medicaid services who signed the claim.

In the case of Dr. Kavaler, on the other hand, you may find that a claim is not false if the services were rendered to the person therein named on the dates set forth therein by Dr. Kavaler or by a doctor of chiropractic medicine employed by Dr. Kavaler or associated with him in his professional practice. It is not necessary that an invoice be untrue in its entirety or claim to be false or fictitious or fraudulent. You may find an entry on any invoice may be true in whole or in part.

If you find some statements on the invoice are true and others are not, you must consider whether the untrue statements were of such a nature as to make the claim taken as a whole false. If the untrue portions of any claim were insignificant, then you would not consider those portions as making the claim taken as a whole false. If, on the other hand, the claim includes some true information but also information which makes the claim as a whole false, this element would be satisfied.

Each count charges a separate offense and you will consider each invoice that is the subject of each open count separately. You should examine each invoice and determine whether the government proved the services claimed therein were actually not rendered.

Again, I remind you that this element requires that you find a claim was made knowingly false, fictitious or fraudulent. It is not satisfied if the statements contained in the claim were untrue because of mistake or some innocent error.

The fourth element of the crime of presenting false claims for payment by the United States which must be proved to your satisfaction beyond a reasonable doubt is that the defendant knew that the claim you are then considering was false, fictitious or fraudulent when he signed his name to the claim form.

This statute makes it a crime to present false claims only if the defendant knows those claims to be false, fictitious or fraudulent. Therefore, if you found that the claims were untrue, but the defendant didn't know them to be untrue, then this element would not be satisfied and you would find the defendant not guilty on any count as to which you find he didn't know that the claim was false, fictitious or fraudulent when it was submitted.

Now, in considering whether the defendant knew the claims to be false, fictitious or fraudulent, you may consider all the surrounding circumstances. You may also consider the nature of any untrue claim or a repetition of any false statements in the claims in determin-

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ing whether any false statement was the result of a mistake or other innocent error or whether the claims were made knowing them to be false, fictitious and fraudulent. You may read and consider the claim forms themselves and you may use your common sense.

As I have instructed you earlier, you must find that the defendant acted knowingly and wilfully as I have defined those words to you for this element to be satisfied. And, unless you are so satisfied beyond a reasonable doubt, you must acquit him. However, if you do find that he acted knowinly and wilfully in submitting false claims and that he did so with specific intent to defraud, it matters not if he only falsified to the extent of $36 on a particular count or only $3. The amount falsified is of no consequence so long as the violation is knowing, wilful and intentional.

Now, as I draw these instructions to a close, I believe a word of caution is appropriate. You are to consider only the evidence in this case that pertains to charges in this indictment. You are being asked to return a verdict as to those specific charges against this defendant. You are not being asked to decide any other issues.

The gist of this case is plainly and simply

in Count 1 a conspiracy charged against this defendant, Ingber and Styles and others to make false claims for professional chiropractic medical services not rendered.

The rest of the counts, 2 and beyond, each pertain to a separate patient as to whom the government contends and the defendant denies that false claims for services not actually rendered were caused to be made payable from the federal Medicaid program by Dr. Kavaler intentionally, nowingly and wilfully. Insofar as concerns any practice of pingponging or a referral of a patient from ony doctor to another or the practice of family ganging or the practice of having a person having routine referrals for blood tests for other medical services or about using factors or signing checks, these practices, if they existed and if this defendant knew of them, the extent that they are relevant at all contained in these charges before you in only the most peripheral way as part of the circumstances bearing on his knowledge and intent.

You are not being asked by your verdict here to approve or disapprove of these practices. He is not being charged here or tried here with personally having engaged in any such practices and those practices are not crimes in the context of this case.

Now, under your oath as jurors, you cannot

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allow any consideration of the possible sentence or punishment which may be infliced upon the defendant if convicted to influence your verdict in any way or in any sense to enter into your deliberations. The duty of imposing sentence rests exclusive to the Court. You are to find on weighing the evidence in the case and decide whether or not the government has proved guilt beyond a reasonable doubt as to any particular count in this indictment. To do so, solely on the basis of the evidence in the case and upon the law. You are not to decide the case upon assumption, conjecture or sympathy or any inference not warranted by the facts until proven to your satisfaction.

If you fail to find beyond a reasonable doubt that the law has been violated as to any count, you should not hesitate for any reason to find a verdict of acquittal. On the other hand if you should find that the law has been violated as charged, you shouldn't hesitate because of sympathy or any other reason to render a verdict of guilty as a clear warning that crimes of such character may not be committed against the government and the public is entitled to this.

Each juror is entitled to his or her own opinion. Each of you should exchange views amongst yourselves. That's the purpose of jury deliberations, to sit

together and consider the evidence. To listen to the arguments of the fellow jurors and present your own individual views and to consult with each other, politely, openly and to reach a verdict based solely and wholly on the evidence, after deliberation, if you can do so without violence to your own individual judgment.

However, each one of you must decise the case for yourself after consideration with your fellow jurors. You shouldn't hesitate to change your opinion which you may hold which after the discussion appears wrongto you in the light of the discussion if it meets the evidence and the law. However, I say to each juror, if after carefully weighing all the evidence and listening to the arguments of your fellow jurors you entertain a conscientious view that differs from others you are not to yield your judgment simply because you are outnumbered or outweighed but only if you are convinced.

Your final vote must reflect your individual conscientious judgment as to how each count should be decided. In order to find a verdict on any count, the jury must be unanimous as to that count.

I told you before that each count is a separate charge and it is decided separately. If you want to see some of the exhibits or all of them or if you want any

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part of the testimony read to you or if you find you are uncertain as to the meaning of any part of my instructions, you may send out a note to the Court through your foreman asking for whatever will clear up any question you may have.

Now, in writing any such note, please do not indicate in the note how the vote of the jury may then be divided. That is not to be set forth in any note.

Also, before you ask for anything to be read, please discuss it first and exhaust your collective recollection. However, if after doing so, you want something read, I'm entirely willing to do so.

Now, if you need a copy of the indictment, you can send for that by note. But, as I have said to you earlier, the indictment is merely a charge and has no status as evidence.

The foreman is Mr. Silver. You are Juror No. 1 and he will sign and send out any communications from the jury by delivering his note to the marshal.

Now, let me finally state to you your oath sums up your duty and that is without fear or favor to anyone you will well and truly try the issues between this defendant and the government of the United States based solely on the evidence according to the Court's instructions on the law. It is important to the defendant, it is

important to the government and it is important to you. Mr. Clerk, would you swear the marshal, please.

(Pause.)

THE COURT: Mr. Russell and Mr. Barnes, at this time I would like to thank you for your attendance here. It turned out everyone stayed in good health and we don't need you. We appreciate your services. You will be excused as soon as the marshal is sworn and the clerk here has your certificates. You don't need to come back tomorrow. I do ask you one thing, don't discuss the case, don't speak to any of the remaining jurors or anyone else until after a verdict has been recorded. That might not necessarily be today or tomorrow. So, please don't do or say anything about the case until the rest of them have finished their work.

You may withdraw from the courtroom.

(Marshal sworn.)

THE COURT: I am going to ask you members of the jury to remain seated where you are for just a few more minutes because I want to confer with the attorneys to see if there is any additional instructions which they would like to have me mention to you or anything I may not have covered in my previous statement.

Now, during this interval, please don't discuss

the case because it might be possible that I might be required to give you some additional instructions which you may not have presently received. Just sit there quietly and patiently for a few more minutes, if you will. I will rejoin you promptly.

Counsel and the court reporter please step inside.

(In the robing room.)

THE COURT: Do you have anything, Mr. Wilson?

MR. WILSON: Yes, your Honor. I think you forgot to mention Herman Pas. You went from Rosa Rodriguez to Alice Rodriguez and Herman is stuck in the middle. He is Count No. 10.

THE COURT: I certainly didn't pass him by intentionally.

MR. WILSON: I know you didn't.

THE COURT: What do you want me to do?

MR.WILSON: I think it is sufficient if you mention to the jury that you inadvertently skipped one as you were reading. I think you started to read Count 10 and the date and then you dropped down to Alice Rodriquez and gave her invoice number.

THE COURT: It could have happened. The date is the same.

MR.WILSON: I don't know why the draftsman of the indictment didn't put the Rodriquez sisters together.

THE COURT: There are a couple of items in it that should have been redacted and were not. I understood you both approved of Exhibit 1.

MR. WILSON: We didn't think of redacting mail fraud counts.

THE COURT: I think it should be done. Is it all right if he blackens it out?

MR. ESBITT: Yes, sir.

THE COURT: Where I didn't read, I would like you to black it out.

MR. ESBITT: You are referring to the individual's names and the individual --

THE COURT: They are out already. I excluded mention of the two sections in Paragraph 12.

MR. WILSON: That's the second thing I want to ask you about.

THE COURT: I did not read the placing in the mail because I had no evidence in this case that he placed anything in the mail.

MR. ESBITT: I have no objection to it being blacked out.

THE COURT: I did not read it to the jury because

it appeared it had been straightened out.

MR. WILSON: There was testimony about the mail.

THE COURT: What was mailed?

MR. WILSON: The treatment plans.

THE COURT: The treatment plans, but not the invoices.

MR. WILSON: That is right. The treatment plans were part of the scheme.

THE COURT: I think it is highly technical. I suppose it fraudulent, even if they didn't render the treatment. I suppose it could be a matter for consideration.

MR. WILSON: You also left out 1001.

THE COURT: I did that intentionally.

MR. WILSON: I wasn't aware that you were going to leave out 1001.

THE COURT: I understood you to say you would elect to take the other.

MR. WILSON: The substantive counts.

THE COURT: Do you want to make this charge so lengthy so that nobody will understand it? I decline to charge 1001 even as part of the conspiracy.

THE COURT: What do you say, Mr. Esbitt?

MR. WILSON: I have some more. You made it clear on two occasions that pingponging and all the other foolish ness that went on is not illegal and it doesn't really have anything to do with defrauding the government. It is our theory which we argued, and I think, we made clear during the trial that this pingponging and all these toher arguably legal acts contributed to the mission of generating income. This is the crux of the whole scheme to run bodies through the system and expose them to the various doctors so they can write invoices either fictitious or --

THE COURT: I think I told you earlier. I thought I went over this. If there were no false invoices for phantom treatments or for treating people who didn't come to the clinic on the date and time indicated on the invoice, I would have acquitted the man. I think the gist of this case is the false invoices which are more than adequately show on this record. I believe the other, pingpoinging and so forth, is only relevant and admissible as bearing on his knowledge and intent.

MR.WILSON: That's true. I think your charge didn't make that quite clear.

THE COURT: I think it did. I really do. I decline to modify the charge.

MR. WILSON: The other thing is that in the

Galler counts which are Counts 2 through 11 and 17 or whatever is left of 2 through 17, we incorporate by reference of the introduction, plus Paragraph 17 which sets forth the means of the conspiracy.

Now Paragraph 17 as used in the substantive counts takes on a different meaning. This just describes the scheme in general terms. Paragraph 17 also includes in subparagraphs I, J, K and L the actual padding and preparation of non-existent invoices.

THE COURT: All of that was read to them.

MR. WILSON: I know that. You made it clear that if they find the conspiracy ended on March 23rd or whatever nothing in that conspiracy count can be counted toward him or against him after that date. Now, as to substantive counts which all occur after the date which we generally think the conspiracy terminated, I think they can still consider those as bearing on the scheme itself. Here, we have a scheme --

THE COURT: I decline to instruct any further at this point on those particular matters. I believe I have stated the issue fairly to them and I think it is a very simple issue. I decline to amplify my instruction in that regard.

MR. WILSON: You also instructed that if the

services are performed by the defendant or someone in his employ, that the invoices would not be false. There's been no evidence whatever in this case that he had anyone working for him on whose behalf he saved this invoice.

THE COURT: There was some testimony. It was very minimal but I think it was in there.

MR. WILSON: I don't think you charged on the defendant's testimony. The stronger the motive.

THE COURT: I certainly did, Mr. Wilson.

MR. WILSON: Maybe I missed it.

MR. ESBITT: I heard it. I'm sorry, but I heard it, Judge.

THE COURT: I said it, I know I said it.

MR.WILSON: You gave the punishment charge. Welll, I guess we disagree on this pingponging thing. I think that's the whole problem in this case. That's the whole problem, this whole Medicaid mill business.

THE COURT: My hope is to keep it as simple as possible so they can understand it and decide it fairly. I say to you right now if this fellow wasn't filing false invoices for services he didn't render on this record before me, I would acquit the man.

MR. WILSON: I just want you to simplify it out of court.

THE COURT: I don't think you are. Jurors will select the kind of society they live in. What do you say, sir?

MR. ESBITT: I have no exception to the charge other than the exceptions which I indicated for your Honor last evening.

THE COURT Very well. All right, gentlemen, we will return.

(In open court.)

THE COURT: Members of the jury, with so much to say on my part, I knew I would make a mistake and leave something out, and I did. I apologize. I failed to read to you, because it was simply due to a mistake in reading, I read -- I mixed up Count 9 and Count 10. I am sorry, Count 10 and 11.

Count 10 is August 16, 1972, Herman Pas, Y485810. The same date as the Rodriguez count which I did read to you. My eye just skipped over Mr. Pas' name and it is my mistake. The count concerning Herman Pas is still before you for your decision. I have nothing further to say to the jurors at this time. I ask you to please withdraw to the jury room in the custody of the marshal and commence your deliberations.

(Jury commenced deliberations at 3:35 p.m.)

THE COURT: Gentlemen, I would like you to place the exhibits which are in evidence in the possession of the clerk and if there should come an uncomplicated note simply asking for specific exhibits by proper identification, perhaps you would consent I could have the clerk just deliver it in.

MR. WILSON: No objection.

THE COURT: Then we will be in recess. I have another matter which I will be hearing in about five minutes. I'd like you to get your exhibits together befo you do that. We will be in recess.

(Recess.)

(5:00 p.m.)

THE COURT: I have a note from the jury and it's been marked as Court's Exhibit 4 and they say they would like to break for the day. I propose at this time to excuse them for the day. I think I will ask them to come at 9:30 tomorrow morning. Please bring in the jury.

(Jury present.)

THE COURT: Members of the jury, I have your note saying that you wish to suspend your efforts for the day and that is perfectly agreeable.

Before you leave, I'd like to make a couple of precautionary comments. One of them is that we're now down to 12 jurors. It takes 12. So,we don't have any alternate jurors, so I ask you to please all stay well and be sure to be here tomorrow and be here on time.

Secondly, go directly to the jury room tomorrow morning and I'd like you to come at 9:30 if that doesn't create any undue hardships. The clerk will take attendance and then you resume your deliberations. But do not deliberate until all 12 of you are there, because it is unfair to have the deliberations which don't include everybody. Everybody can listen and participate. You can discuss the weather or something else until you are all there at 9:30 and then you can begin deliberations on the case.

JUROR NO. 8: Your Honor, I have an appointment at 9:30 in the morning. I would like to make it at 10:30.

THE COURT: 10:30.

JUROR NO. 8: I can't change it, your Honor.

THE COURT: 10:30,members of the jury. Please come as promptly as you can. One more thing, I want to say to you and it is most important. Do not discuss the case, the issues in the case or your deliberations or how it is going or anything like that with anybody. Don't read or hear or listen to anything that might affect your openmindedness. Decuse the case solely on what you have received in evidence in court and what took place and not any extraneous matter. I don't want anybody to do anything which would cause a mistrial by failing to follow my instructions. Please be sure that you do exactly as expected of you and keep yourselves aloof from anything and be on time at 10:30 and resume your deliberations at that time. Don't discuss the case in the meantime. You are now excused for the day.

(Jury leaves the courtroom.)

THE COURT: It looks like it is 10:30, gentlemen. I'll see you all at 10:30. Good night.

(Time noted: 5:05 p.m.)

UNITED STATES OF AMERICA
vs.
MAX KAVALER. 76 Cr. 241.

New York, July 29, 1976.

(Trial resumed.)

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(At 11.50 A.M., in open court, jury not present.)

THE COURT: We have a note: "Can we see the testimony of H. Ingber and Sheldon M. Styles andBarbara Cupola."

They also ask for the marriage certificate of Alice R. Caro, and that was supplied to them at the time the note was received.

They have asked for quite a good amount of testimony, and I am prepared to begin. I don't know whether they would modify their demand to any particular part of the testimony or not. If no one has any further comment, I will bring in the jury.

MR. ESBITT: I have no comment, your Honor.

THE COURT: Bring them in.

(Jury present.)

THE COURT: Good morning, members of the jury. I have your note here and I judge from that note the way

it is written that you would like to have the court reporter read all of the testimony of Ingber, Styles and Cupola. Of course, I am willing to do that, but that is a considerable amount of reading. If there is any part of that testimony that you want to limit your question to, of course, you could do that. But if you want to hear it all, I will have the court reporter read it all.

JUROR NO. 12: Not all.

THE COURT: Then will you attempt with as much clarity as you can to give me another note in which you would tell me what subject matter or what part of the testimony you want read. But please understand, Jurors, I am willing to read it all if you would like.

JUROR NO. 7: No, we don't want it all.

THE COURT: All right, please withdraw then. And write me a new note specifying each topic or subject matter, or if you remember the day of the trial, that you want to have read, or whatever your real wishes are. You may now return to the juryroom and compose another note then.

JUROR NO. 11: We can't have a copy of the whole testimony?

THE COURT: No. The procedures are as I told you during my instructions, members of the jury, I will

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have Mr. Wolf here read to you in question-and-answer form any testimony that you want to have read or even all of it, but it takes time to read it. So if you want to give me a more specified letter, I will follow your wishes, whatever the jury wants.

Please return to the juryroom.

(At 11.55 a.m. the jury retires for further deliberation.)

jpp 1

(At 12 o'clock noon, open court, jury not present.)

THE COURT: We now have another note and they want to hear Barbara Cupola's testimony pertaining to invoices. So, we will all open the transcript to Mrs. Cupola and tell me what pages are agreeable. She starts at page 403.

MR. WILSON: I think that's her whole testimony, Judge.

MR.ESBITT: I would think with respect to a reply for that request, I would think the entire testimony of Barbara Cupola from beginning to end would be necessary.

MR. WILSON: I agree.

THE COURT: I am inclined not to dispute your contention because it is so short. But I don't want to, by going along with that contention, lay myself open to any similar broad interpretation to any more notes they might give. Bring the jury in and we will have all of Mrs. Cupola's testimony read.) I have no intention in setting any precedent here for any more testimony that they might ask for.

MR. ESBITT: I assume that includes all of direct, cross-examination, redirect and recross examination that there might be?

THE COURT: Yes.

Bring out the jury.

(Jury returned to the courtroom.)

THE COURT: The court reporter will now read Mrs. Cupola's testimony.

(The entire testimony of Barbara Cupola was duly read to the jury.)

THE COURT: Members of the jury, the United States Marshal will take you all to lunch very shortly at your convenience. I will ask you not to discuss the case in a public restaurant, if they put you any place where outsiders or other people can overhear what is said at your table. The best place for your jury deliberations is in the juryroom. Have a pleasant luncheon and you will resume when you return from lunch. You may withdraw from the courtroom.

(Jury excused from the courtroom at 12.20 p.m.)

THE COURT: We will be in recess until about 2.00 p.m., gentlemen.

(Luncheon recess.)

AFTERNOON SESSION

1:p.m.

(2:35 p.m.)

THE COURT: There is a new note which has been received as Court's Exhibit No. 1. Have you seen it?

MR. WILSON: Yes.

THE COURT: If there are any comments or suggestions, I am prepared to proceed with this. I assume when the ntoe says "completely," I think it means all the counts. The note reads:

"One juror completely disagrees with all the counts."

MR. WILSON: They haven't been out very long.

THE COURT: No, they have not.

MR. ESBITT: I suppose there are three possibilities, your Honor.

THE COURT: At least three, Mr. Esbitt, but I'd like to hear your three.

MR. ESBITT: One is to tell the jury to continue deliberating. One is to declare a mistrial. I suppose the thied is an Allen charge. Maybe there are others. I would oppose an Allen charge because I don't think the jury has been out long enough. I'm not prepared

without conference with my cleint as to whether I would recommend to your Honor to declare a mistrial. But if you wish me to, I will confer with my client and give you my recommendation.

THE COURT: I don't insist that you do that because I don't think I would grant a mistrial this early in the deliberations even if you were to move for it. If you want to move for it to protect your record, you may do that. I won't grant it now because I don't think they have been out long enough and I don't think they have really discussed it long enough or sufficiently in good faith. I throw out this possibility: I might simply write them a note in response to theirs, please keep deliberating and make an effort to agree upon a verdict based upon the evidence in following the Court's instructions as to the law. I'm willing to do that unless there is an objection to that. Otherwise, I might call them back in here and give them a modified Allen charge. I don't give the true Allen charge whcih says the majority is better than the minority.

MR. ESBITT: I would object to any form of Allen charge at this time. I don't think that the jury has been out that long a period of time. According to my records, the jury went out at 3:30 after your charge yesterday and at 4:30 they requested permission to be sent

home.

THE OCURT: It was about 5 that I sent them home.

MR. ESBITT: Yes, that's about right. This morning they resumed deliberations at 10:30. They asked for a portion of the testimony to be read to them. It was. At about 12:30 theywere sent out to lunch and now it is approximately 2:30 or 2:35 when they sent the note into your Honor. So, it has not been a long time for deliberation. So, perhaps, merely to send a note in and ask the jurors to continue their deliberations.

MR. WILSON: I agree, your Honor.

THE COURT: I think that's a sensible approach, Mr. Wilson. I think Mr. Esbitt's point is well taken. I would have to say that the late Judge Mc Lean gave me two basic premises which I have tried to follow: One is never bother the jury unless they bother you. "You" being the trial judge.

The second thing is don't give the Allen charge except first thing in the morning because we don't want the jury at the end of the day to do some slap-thing that they would later regret simply because the Court has urged them to agree.

So, I try to follow those twopremises to the best

of my ability. I will compose a note and I will see if you all find it satisfactory.

(Pause.)

THE COURT: May I read you the note.

"Members of the jury, please continue your deliberations and attempt to decide the counts or as many of them as you can unanimously and conscientiously according to the evidence following the Court's instructions as to the law."

MR. WILSON: That's agreeable to the government.

MR. ESBITT: Satisfactory, your Honor.

THE COURT: I will have the note carried by the marshal into the jury room.

(Jury deliberations continued at 2:45 p.m.)

(In open court; jury not present.)

(5:20 p.m.)

We have a note which says "We need an invoice for Count 16, Maria Colon," which I am marking the next Court exhibit. Would you please make that available to them. That is the invoice for Count 16, Maria Colon.

MR. WILSON: Your Honor, the one for Count 16 was Government's Exhibit 11-A. That was with the batch of invoices we sent in on the first day. I think if you were to ask them to recheck the tags on the invoices that if they find Exhibit 11 that's the one that applies to Maria Colon. Unless by some mistake it was left out. We double checked and we thought we had all the invoices in that exhibit. 11-A is the treatment and 11 is the invoice.

THE COURT: What's your pleasure? Would you like me to just send in a note and tell them that?

MR. WILSON: I think so.

THE COURT: How about you, Mr. Esbitt?

MR. ESBITT: If that's what they ask for. If we can't find it, I would believe you should ask them to recheck for it.

May I suggest, your Honor, that if they don't find it, please let your Honor know and then we can supply

them a copy of it.

THE COURT: I will read the composed note.

"Members of the jury, the invoice for Count 16 is Government Exhibit 11-A which I believe you have. Please check for the exhibit tag. If you don't have it, please send out a note and I will locate a copy of the exhit for you."

Is that agreeable?

MR.WILSON: Yes, your Honor.

MR. ESBITT: Yes, your Honor.

THE COURT: Now, off the record.

(Discussion off the record.)

(In the robing room.)

THE COURT: Go ahead, Mr. Esbitt.

MR. ESBITT: Your Honor, it is now 5:33 and the jury is still out. Despite the fact that they have just sent a note in requesting the original invoice for Count 16 and your Honor has sent them a note with respect to it, nonetheless, in view of the fact that the jury has sent two notes to your Honor at different periods of the afternoon indicating at least in my judgment that they are hopelessly deadlocked and unable to reach an agreement on two occasions, I respectfully submit that it would be appropriate to declare a mistrial. I so move.

THE COURT: Mr. Wilson?

MR. WILSON: I note the jury came in at 10:30 and it is now 5:30. That's seven hours. They have had an hour and a half for lunch. They have worked for only five hours.

THE COURT: During that time I was reading testimony for a certain period of time.

MR.WILSON: They have had less than seven hours of actual deliberations. This has been seven trial days. I think they should work much longer.

THE COURT: Well, I don't think in view of their recent note that I could really say they were hopelessly deadlocked. It is obvious they are having some trouble. I belive they are constructively deliberating since they asked for some paper. I decline to declare a mistrial at this time. I do not intend to coerce the jury. I think the jury has shown that they are persons who have their own mind because they were quick to tell us when they wanted to break for the day yesterday. I really came downstairs before I got the last note, I came down with the intention of sending them home for the night. I also had in mind that perhaps in the morning if they say they are deadlocked, I may give them a very modified Allen charge with no emphasis on majority or minority or any

of the things that hafe been criticized. I know Judge Conner has one in about ten words which is quite effective. I think I would just try to say something general to them without putting the heat on any particular majority or minority as the case may be. Notwithstanding comments of the Court of Appeals to the contrary, I think really a defendant would rather have a verdict than go through this again. You don't have to respond to that, Mr. Esbitt.

MR. ESBITT: I understand you denied my application.

THE COURT: I'm denying your application at this time.

MR. ESBITT: May I go off the record.

(Discussion off the record.)

THE COURT: The jury has responded to the Court's note saying "We could use a copy, can't locate here Exhibit 11 and 11-A." In the interim it has been found in the courtroom and I am now sending the original of that exhibit in through the marshal.

(Jury deliberations continued.)

(In open court; jury not present.)

(5:40 p.m.)

THE COURT: I propose, if there is no objection to send in a note to read as follows: "Members of the

jury, when and if you are ready to break for the day and resume working tomorrow morning, I am willing to do so. If you wish to continue deliberating past 7:30 you will be taken to dinner and limousines provided to take you home. Those of you who have telephone messages to send home may give notes to the marshal. Whatever the jurors wish to do is acceptable to the Court. Please let me know your preference."

Is that agreeable?

MR. WILSON: Yes, Judge.

MR. ESBITT: May I see the first part, Judge?

THE COURT: Yes, certainly.

(Handing.)

THE COURT: Is that satisfactory?

MR. ESBITT: Yes, sir.

THE COURT: How about you, Mr. Wilson?

MR.WILSON: Yes, sir, satisfactory.

(Jury deliberations resumed.)

(In open court; jury present.)

(6:45 p.m.)

THE CLERK: Mr. Foreman, have you agreed upon a verdict?

THE FOREMAN: Yes.

THE CLERK: What is your verdict as to Count 1?

THE FOREMAN: Count 1, guilty.

THE CLERK: Count 2?

THE FOREMAN: Guilty.

THE CLERK: Count 5?

THE FOREMAN: Guilty.

THE CLERK: Count 6?

THE FOREMAN: Guilty.

THE CLERK: Count 9?

THE FOREMAN: Guilty.

THE CLERK: Count 10?

THE FOREMAN: Guilty.

THE CLERK: Count 11?

THE FOREMAN: Guilty.

THE CLERK: Count 15?

THE FOREMAN: Guilty.

THE CLERK: Count 16?

THE FOREMAN: Guilty.

THE CLERK: Count 18?

THE FOREMAN: Guilty.

THE CLERK: Count 19?

THE FOREMAN: Not guilty.

THE CLERK: Count 21?

THE FOREMAN: Guilty.

THE CLERK: Count 22?

THE FOREMAN: Guilty.

THE CLERK: Count 25?

THE FOREMAN: Not guilty..

THE CLERK: Count 26?

THE FOREMAN: Guilty.

THE CLERK: Count 27?

THE FOREMAN: Guilty.

(Jury polled. Each juror, when asked if that was their verdict, replied in the affirmative.)

THE COURT: I will direct the clerk record the verdict and at this time I will discharge the jury and as I understand it, the clerk has your certificates and we won't need you tomorrow.

Before you leave there are one or two words I would like to say to you.

I appreciate your prompt attendance during the trial in your being here and doing your civic duty. Of course you are released from my direction that you can't discuss the case. You now have all of your rights as American citizens and you can say whatever you want and do anything you want to do.

By the same token, many of you will feel happier, I'm sure, if you do not discuss your verdict

or your deliberations with anybody.

Also, I want to instruct you that nobody has any right to harass you or ask you or inquire of you about the case, any newspaperman or anything like that. If any person bothers you about your verdict or talks to you or tries to interview you or anything like that against your will, then I encourage you to report that to the Chief Judge of this court and tell the person that the trial judge instructed you that you didn't have to say anything. Of course you have all your rights of free speech. The only reason I made the direction that you shouldn't discuss the case during the trial was to make sure of an impartial verdict. At this time you are excused with the thanks of the Court and you may withdraw from the courtroom.

(Jury excused.)

THE COURT: The Court will direct that the probation office make a full presentence report concerning Dr. Kavaler. He can go there tomorrow at 10 o'clock and I will continue the defendant on bail and I will fix a date.

MR. ESBITT: He's out in his own recognizance.

THE COURT: Well, that's bail. September 17th at 9:30. Room 1506.

MR. ESBITT: Did you say you wanted the defendant at probation tomorrow morning?

THE COURT: Yes, it is too late today. You are welcome to do that. You don't have to go.

MR. ESBITT: I understand that.

THE COURT: You understand your obligation to be here on September 17th, don't you, Doctor?

THE DEFENDANT: Yes, I do.

THE COURT: The Court will be in recess.

The foreman has handed me a copy of the calculations made by the jury during deliberations. I am marking it as Court Exhibit 10.

(Court Exhibit 10 was marked.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

-against-

MAX KAVALER,

Defendant.

76 CR. 241

NOTICE OF MOTION FOR NEW TRIAL

----------x

S I R:

PLEASE TAKE NOTICE, that upon the annexed affidavits of WILLIAM ESBITT and JOSEPH J. HANRAHAN, duly sworn to the 13th day of September, 1976, the defendant will move this Court on the 17th day of September, 1976 at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, in Room 1506 in the Federal Court House, for an order pursuant to Rule 33 of the Federal Rules of Criminal procedure setting aside the verdict of guilty against the defendant returned in the above entitled criminal proceeding by a jury on July 28, 1976, and to grant a new trial on the ground of newly discovered evidence of which defendant was ignorant at the time of the trial herein and which he could not have sooner discovered in the exercise of due diligence;

and for such other and further relief as to this Court may seem just and proper.

Dated: New York, N.Y. September 13, 1976

Yours, etc.

WILLIAM ESBITT
Attorney for Defendant
Office & P.O.Address:
122 East 42nd Street
New York, N.Y. 10017
Tel.: 697-0133

TO:

HON. ROBERT B. FISKE, JR.
United States Attorney
One St. Andrews Plaza
New York, N.Y. 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

76 CR. 241

-against-

AFFIDAVIT

MAX KAVALER,

Defendant.

----------x

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

WILLIAM ESBITT, being duly sworn, deposes and says:

That he is the attorney for the defendant in the above entitled proceeding and that he is submitting this affidavit in support of defendant's motion for a new trial on the ground of newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

The defendant was convicted after a jury trial on Thursday, July 28, 1976.

The defendant, Max Kavaler, testified at the trial and, among other things, testified that he had worked as a chiropractor at the Lee Avenue clinic of one Dr. Alizadeh for a period of only four months during the year 1971 and there was

introduced in evidence to substantiate Dr. Kavaler's testimony a 1971 diary which Dr. Kavaler testified contained a list of the patients treated by Dr. Kavaler during those months in 1971.

On cross-examination, Mr. George Wilson, Assistant United States Attorney, vigorously cross-examined Dr. Kavaler casting doubt upon his veracity and particularly with respect to when he had worked at the Lee Avenue clinic and challenging the authenticity of Dr. Kavaler's 1971 diary concerning his Lee Avenue patients.

After Dr. Kavaler's testimony was completed, the defense rested and Mr. Wilson in his rebuttal presented Dr. Alizadeh as a witness to establish that Dr. Kavaler did work at the Lee Avenue clinic in 1972 and 1973 and that therefore Dr. Kavaler was not telling the truth and that his documentary record was spurious.

Dr. Alizadeh could not confirm with any degree of assurance that Dr. Kavaler did work at his clinic in 1972 and 1973 and thereupon Mr. Wilson put on as a final rebuttal witness a Mrs. Gloria Silver, an employee of Dr. Alizadeh, who testified that she thought Dr. Kavaler did work in 1972 and

1973 (R.1281) at the Lee Avenue clinic. On cross-examination by your deponent, Mrs. Silver testified that she was positive that she saw him in 1973 and possibly saw him in 1972 (R.1283).

Annexed hereto is the affidavit of Joseph J. Hanrahan, a special investigator employed by your deponent, who recent interviewed Mrs. Silver and obtained a statement from her to the effect that she recognized after she had left the witness stand that her testimony was in error and that in fact Dr. Kaval did not work at the Lee Avenue clinic of Dr. Alizadeh either in 1972 or 1973 and that she so informed Mr. Wilson on the morning of Wednesday, July 27, 1976. For further details the Court's attention is invited to the affidavit of Joseph J. Hanrahan.

It is clear from the sequence of events that the testimony of Mrs. Silver, occurring as it did in the final few minutes of the trial and leaving a clear impression in the minds of the jury that Dr. Kavaler's testimony was false and that his records were fictitious, had a substantial impact upon the jury and was of such a nature that on a new trial would probably result in an acquittal of the charges against the defendant. (See summation of Mr.Wilson annexed hereto as Exhibit B.)

The evidence which has now been presented to this

Court was in fact duly discovered and came to our attention just a few days ago, namely on August 24, 1976, and is not just cumulative or impeaching but one which had been brought to the attention of the Assistant United States Attorney prior to the time when the case had been presented to the jury, and should under the Doctrine of Brady v. Maryland have been brought to the attention of the Court and of the defense counsel.

It is respectfully requested that a hearing be held so that witnesses may be presented to the Court in support of this motionfor a new trial.

William Esbitt

WILLIAM ESBITT

Sworn to before me this
13 day of September, 1976

Dorothy Ingber

DOROTHY INGBER
Notary Public, State of New York
No. 03-1321862
Qualified in Bronx County
Term Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

76 CR. 241

-against-

AFFIDAVIT

MAX KAVALER,

Defendant.

----------x

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

JOSEPH J. HANRAHAN, being duly sworn, deposes and says:

I was employed by William Esbitt, attorney for the defendant, Dr. Max Kavaler, as a special investigator during the trial of the criminal charges against him and I am familiar with the facts hereinafter set forth.

Gloria Silver, an employee of Dr. Alizadeh, was called as a retuttal witness by Mr. George Wilson, Assistant United States Attorney, and testified on the morning of Tuesday, July 27, 1976, the last day of the trial. Mrs. Silver testified that according to records kept by her or with which she was familiar, Dr. Kavaler paid money in 1972 and 1973 to

Dr. Alizadeh apparently in payment for his work at Dr. Alizadeh's clinic but not for other chiropractors.

On cross-examination by Mr. William Esbitt, attorney for Dr. Kavaler, Mrs. Silver testified that she was not certain that Dr. Kavaler worked at the Lee Avenue clinic of Dr. Alizadeh in 1972 but was quite certain that Dr. Kavaler did work at the clinic in 1973.

On August 24, 1976, I was informed that Mrs. Gloria Silver was mistaken in her testimony and that she had returned to the court house with Dr. Alizadeh on Wednesday, July 28, 1976, for the purpose of seeing the judge and correcting her testimony. On August 25, 1976, I personally interviewed Mrs. Gloria Silver and she gave me the following information.

That after she left the court house on Tuesday, July 27, 1976, she realized that she had incorrectly stated the facts concerning Dr. Kavaler's working at the Lee Avenue clinic and discussed this with Dr. Alizadeh and with Mrs. Dawn McLean, the bookkeeper of Dr. Alizadeh's clinic. She also consulted her lawyer, Mr. Joe Perrini, and was advised by him that she should go back to the court house and tell the judge of her mistake. Mrs. Silver told me that about 8:00 or 8:30 on Wednesday morning, July 27, 1976, she was picked up by

Dr. Alizadeh and both of them went to the Federal Court House to look for the judge who tried the case. After wandering around for a time trying to find the judge, they ran into the agent who had picked them up the previous day and brought them to the court house to testify. Mrs. Silver explained to him that she wanted to see the judge to correct her testimony and he took her and Dr. Alizadeh into the witness room and sent for Mr. Wilson. When Mr. Wilson arrived, Mrs. Silver explained to him that she wanted to see the judge and correct her testimony. Mr. Wilson appeared angry and spoke in a loud voice to her, asked her to read from a book he gave her concerning her previous testimony. She looked at the questions and answers in the book and she could not find where Mr. Wilson asked her whether or not Dr. Kavaler worked at Lee Avenue in 1972 and 1973. Mrs. Silver stated she felt the jury and the Court got the erroneous impression that Dr. Kavaler worked in 1972 and 1973 in the Lee Avenue clinic. Mrs. Silver informed me that he did not work at Lee Avenue during that period but she did see him at the clinic when he asked for invoices and prescription blanks which were in short supply at the Galler clinic. She stated she saw him perhaps once or twice a year during 1972 and 1973 but he did not work at Lee Avenue at any time after 1971.

In my conversation with Mrs. Gloria Silver, Mrs. Silver

said that Mr. Wilson told her that there was no reason to change her testimony because he said that she had said nothing wrong and that he did not take her to see the judge but told her to go home.

The statements made by Mrs. Silver were made on tape and a transcript of the material portion is annexed hereto marked Exhibit A and made a part herof. The entire tape will be available for production.

I have endeavored for the past week to obtain a signed sworn statement by Mrs. Silver in additionto the tape recording, but all efforts to contact Mrs. Silver have been unavailing. Calls to Mrs. Silver at her home and the place where she works have not resulted in her answering the telephone and all messages left for her at her office and at her home have not resulted in a return call.

Joseph J. Hanrahan

SWORN to before me this
13th day of September, 1976

DOROTHY INGBER
Notary Public, State of New York
No. 03-1921862
Qualified in Bronx County
Commission Expires March 30, 1977

Joseph J. Hanrahan questioning Gloria Silver, August 25, 1967:

Q. So now you felt that this wasn't right and you decided to do something about it?

A. I felt that either I was very nervous or was questioned incorrectly or they didn't give me time to think and it bothered me, so when I came back asked Dawn about the checks and I tried recalling. I remembered my own papers - that little red name must have been Winston because we have a chiropractor, I remember his name was Winston. Then after that I called the doctor who owns the building, Dr. Alizadeh. I mentioned it to him. I said I think I made a mistake. Dr. Kavaler must have been only working four months. They asked me if he worked 72 and 73 and I think I answered wrong and I want to correct this. You know, I didn't know if I can. I know nothing about the system, if I can go back and retract anything or not. So I didn't sleep that night and then in the morning - at 7:00 in the morning - I called Joe Perrini, which is my lawyer, my attorney, and I asked - I told him what happened and he said that if I felt I made a mistake I should go back immediately into the building and talk to someone, preferably the judge. Like I said, I can't even get into the building. It was a little hard getting in.

Q. Into the same building in which you testified?

A. Actually I was confused. I was so nervous I didn't know what building I was going into. Yes, finally I wound up there. I went into the wrong building, up and down elevators. I had to sign a book. In the process of not being able to get in, because I didn't have that paper, we happened to bump into that young fellow. The one that told us to go, the little guy.

EXHIBIT A

Q. Was that the - could you describe him to me?

A. The young guy with glasses - small frames.

Q. O.K., and you met him?

A. Yes, and I told him - in fact the doctor - at that time I was very upset - the doctor spoke to him and said look, Gloria feels she made a mistake, that they asked her either the wrong question - anyway it was a mistake and she wants to go back there and let them know that Dr. Kavaler was not working 72 and 73. Yes, she did see him. I didn't want to tell the doctor I was giving away his invoices or his prescriptions, you know. I just wanted to tell him I saw him and that was it. So the doctor helped me. We went up there and, like I said, we met this young fellow and he got us into the building and he went - he made me sit down. I sat there I don't know how long and finally this other tall man came. Like I said, I didn't know their names or their ages.

Q. Could you recall what he looked like?

A. He is tall with blue eyes - moustache - attractive.

Q. And you spoke to him?

A. Yes. He finally came out and he spoke to me. He asked what was the problem and I said I felt I made a mistake. He said what was the mistake and I told him - I don't know who asked me - if it was him or the other lawyer or whoever - what were the years that Dr. Kavaler was working there. And I had said maybe 72 and 73 and I recall he only worked four months. Who was working at the time was Winston maybe or whatever doctor was taking - filling in for the time. He said to me that that wasn't the question I was asked but I was asked if I had seen Dr. Kavaler. He said, did you see him within 72 and 73. I said, Yes I had. He said that's all I asked you. I said, Yes but it doesn't seem right, that it seems like you are asking if he was working. Somebody

did, I said. If it wasn't you,it was somebody else who asked me that. All I came up here was to retract that and say that he wasn't working in 72 and 83. They gave me a book which shows that my answers - questions and answers, you know - that they asked - and I didn't see that question was he working. I said, well I don't know, I am very upset and I just came up here to say that he worked for four months.

Q. Well, what did he do then?

A. Well, then... What do you mean what did he do?

Q. Did he ask you to make a statement to him?

A. No. He said, would you want to change anything in there? Well, I says, the way it is in the book, you know, I don't see any changes that have to be made. It says - he asked me did I see Dr. Kavaler. I said yes. I don't see the question in that book was he working in 72 and 73 but I felt that's the impression I might have given the jury. In fact, I was almost positive - that's what was bothering me.

Q. All right. What did he say then after you said you didn't see the question --

A. I was asked did I speak to Dr. Kavaler's (stet) called me the night before or did I speak to Yvonne. I said I hadn't spoken to either one of them and I says I came up here, I just came up here, to retract my own statement. No one has called me and no one could make me say something I don't want to say. This is the truth and I felt I made a mistake and it bothered me and that's why I came up and the doctor was - gave up his work to do this for me.

Q. Dr. Alizadeh, was he with you at the time?

A. Yes. He sat with me in fact two hours or whatever - loosing, you know - made his patients wait in his office.

Q. Was there anything said to Dr. Alizadeh?

A. Yes. He was asked did you speak to Dr. Kavaler. Did you speak to Yvonne. Either one of them. And he said no. And the doctor was very upset and very annoyed that they did ask him that question. He was only there to help me get into the building because I was upset.

Q. And what did this man say to you or to him?

A. He said, I know you are not too happy with this whole situation...that one of your doctors or a doctor is being indicted. Dr. Alizadeh kept very quiet. He was kind of annoyed with the whole thing that they should speak to him this way, and he said, look I just brought Mrs. Silva up here because she felt she had something to say. After all, I want with the man yesterday. The least he could do is come with me the following day. And they seemed quite annoyed.

Q. Did he say anything? Beyond seeming annoyed, did he say anything that indicated he was annoyed at you or Dr. Alizadeh?

A. Well, the idea that I came back. Did I want to change anything.

Q. Well, let me ask you outright, did he threaten either you or Dr. Alizadeh in any way?

A. Well not in so many words. Just like I said, he said that Yvonne is going to get into a lot of trouble if she kept this nonsense up. You know, that they know

that she went and called up people to get, you know, statements. I said I had no knowledge of that, that is none of my business. All I want to do is come up here and fix what I said wrong. That's all I wanted.

Q. He didn't ask you to sign anything?

A. No, no. They didn't sign anything. After that he calmed down after that and he says, well, look at the book. Is there anything wrong. And I said, no but I just - I kept repeating myself about the two years of 72 and 73. That was it.

Q. All right. Then he said you can go home? You didn't say that-- did he intimate that there was anything wrong with Lee Avenue?

A. No.

Q. And he didn't threaten that there would be an invesigation of Lee Avenue because of your coming forward and inquiring anything?

A. Well, I was upset when I was there too because he speaks very loud, you know. And I can't recall exactly what he said. All I know was that we were upset the way we were spoken to. I went there to, you know, to fix something up. He didn't have to holler like that. First of all, I wasn't even called up there in the first place.

Q. He hollered at you,though?

A. Yes, he speaks very loud. Yes.

Q. And did you feel intimidated because he was hollering at you?

A. Well, I was upset. I get upset, you know.

Q. And what impression did you get? Did you think he

was implying that Yvonne or Dr. Kavaler had contacted you and tried...

A. They were annoyed.

Q. ...to school you into saying something else?

A. That was their first question, Did you see them or did they get in touch with you,.....

Q. ...When you say they...

A. ...which I was very, very insulted when they said that to me.

Q. When you say they, who was ...

A. He said that and the other man ...

Q. Was he alone?

A. The young man was with him.

Q. At all times?

A. Yes, I recall.

Q. All right, and this was in the courtroom building or did they take you somewhere else?

A. No. They took me into this room where I waited before, like last time,when they call you in to testify.

Q. Oh, that room?

A. The room with big tables and chairs.

Q. That's where he spoke to you?

A. That's right.

Q. And he never said anything about going to see the judge?

A. No.

Q. He just said, after you spo[illegible] - pardon me - did ... there is no reason to change anything?

A. There is no reason to change anything, he said. According to them, they had felt I had said nothing wrong, to intimate, to say that I know I did anything wrong for him, which I felt I had, the way I was questioned and in the manner I was questioned, I felt I did answer wrong.

rmp6 PORTION OF MR. WILSON'S SUMMATION

You recall the book for Lee Avenue, Defendant's Exhibit AC, which was apparently lost from the first subpoenas, January, 1972, December, 1974, and found some time after that and was not turned over with a subpoena back in July because Dr. Kavaler made the decision this didn't apply to patients.

What do we have? We have a book which has patients which begin on February 10, 1971, and end on May 27, 1971. The counts begin March 31, 1971, and end on May 7, 1971. Dr. Kavaler testified when he was asked why was this so short that well, he didn't work at Lee Avenue after May of 1971.

You heard the testimony of Dr. Alizadeh and his secretary, Mrs. Silva, they were receiving rent payments from him as late as January, 1974, and it was their best recollection that he worked there as late as December, 1973, and Mr. Esbitt has suggested to you, and will doubtless continue to suggest, that Dr. Kavaler was making rent payments for other people because he had these relationships with them where they were working for him really.

Also in evidence are the rent pages from these other doctors and you may inspect them and compare the dates and you may find from looking at these that they made their own rent payments and the rent payments on Dr.

Kavaler's sheet are Dr. Kavaler's rent payments because he worked there until late 1973. There is evidence of Dr. Kavaler's attempt to falsely explain why this record ends just a month -- less than a month -- after the last substantive count in the indictment.

A 306

I ask you to take this into the juryroom and call for it and look for it. Look at the condition of this book which is now five years old. The pages are all clean. They are not dogeared. Look at the entries that are made. In most cases, it appears that the name has been copied in rote, one after the other. When you write something down 20 times, look at the ink color of it, sometimes the ink is varied.

The same thing with the other book. The one thatwas also not turned over pursuant to three different subpoenas, and it appears the first time at trial. Take a look at the names. Look at the books and decide for yourself whether these things are genuine articles. Even if they are the genuine articles and you assume that they are, it is just as easy if you were to write a false invoice and you were to write a false patient chart, you can make an entry in that book, too.

If you find that these entries were made at different times, I think you can find, at least, looking at the Lee Avenue book, it was made at one sitting, maybe with two or three different pens.

So, you have the right to examine that, and I ask you to do so and examine his patient records. In every case, you will find the patient record matches the invoice

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v -	:	AFFIDAVIT IN OPPOSITION TO MOTION FOR NEW TRIAL
MAX KAVALER,	:	
Defendant.	:	S 76 Cr. 241 (CLB)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

GEORGE E. WILSON, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and as such I am fully familiar with the facts of the above-captioned case. This affidavit is submitted in opposition to the defendant's motion pursuant to F.R.Cr.P. 33 for a new trial.

2. Defendant claims that he is entitled to a new trial on the grounds of newly discovered evidence. This evidence is the alleged post-trial retraction of testimony by a government rebuttal witness after an overnight consultation with her employer, Dr. Hamid Alizadeh, during which time she apparently had her recollection "refreshed". This alleged retraction is claimed to be Brady material, thus justifying a new trial. Even assuming the facts as alleged, defendant is not entitled to a new trial.

3. At trial the Government contended that a notebook (DX AC) offered by Kavaler, which listed his alleged Lee Avenue clinic patients, was a recent fabrication. In support of this contention the Government called as a rebuttal witness Dr. Hamid Alizadeh, the proprietor of the Lee Avenue Medicaid clinic at which Kavaler was employed. As contended in Kavaler's papers Dr. Alizadeh could not confirm to any degree of assurance that Kavaler worked at the clinic in 1972 or 1973. He did, however, testify that Kavaler's last check was received by him in January of 1974 (Tr. 1257) and that Kavaler could have treated patients as late as October, November or December of 1973 (Tr. 1258). He admitted, on cross-examination (Tr. 1261), that Kavaler might have worked only in 1971.

4. Dr. Alizadeh's secretary, Gloria Silva, was called chiefly to identify rent records of Kavaler and other doctors. (GX 71A-71G*; Tr. 1208-1280) In substance, her testimony was of little better value other than to acknowledge that she had seen Kavaler at the clinic during 1972 or 1973 and that he might have treated patients there. At the conclusion of her testimony the following ensued:

(BY MR. WILSON):

Q. Mrs. Silva, you know Dr. Kavaler, do you not?

A. Yes.

Q. Have you seen him around the clinic?

A. Yes.

Q. Have you seen him on nights and days when he treated patients?

A. I seen him on days.

* These records show that Kavaler made rent payments for himself on 4/1/71, 5/4/71, 9/22/72, 10/16/72, 11/2/72, 12/26/72, 12/23/72 and 3/13/73. (GX 71A) He also made payments for Dr. Winton on 8/10/72, 8/15/72, 2/6/73 (GX 71G) and 9/7/72 (GX 71A); and for Dr. Newfield on an unspecified month in 1973 (GX 71C).

Q. When do you recall was the last year you saw him?

A. The last time I saw him?

Q. Yes.

THE COURT: The last time you saw him treating patients is what the question was.

A. I'm not too sure, '73, '72.

Q. '72 or '73?

A. Yes.

Q. The last payment you saw was January of '74, do you remember him treating patients then?

A. Could be. (Tr. 1281)

MR. WILSON: Your witness.

(Government's Exhibits 71-C through 71-G were received in evidence.) (Tr. 1282)

CROSS EXAMINATION

BY MR. ESBITT:

Q. You said could be, are you positive under oath that you saw him in 1973?

A. Yes, I did.

Q. And in '72?

A. '72, possibly.

Q. And '71?

A. '71, I did.

Q. You saw him in '71.

MR. WILSON: No redirect. No further witnesses. We rest.

THE COURT: Anything else from you, Mrs. Nesbitt?

MR. ESBITT: No.

THE COURT: Alright, both sides rest. (Tr.1283)

5. On July 28, 1976 immediately after the Government's summation-in-chief, a recess was declared. Mr. Hartwig, one of our investigators advised me that he had run into Dr. Alizadeh and Mrs. Silva. Mrs. Silva thought she had testified falsely in answer to the "old man's" questions by saying that she saw Kavaler work at the Lee Avenue clinic in 1972 and 1973. I showed her her testimony on cross by Mr. Esbitt. She had apparently felt that she had unequivocally responded that she saw Kavaler working at Lee Avenue in 1972 and 1973 when in actuality she had merely said she had seen him during that period. After reading her testimony Mrs. Silva appeared to be relieved that she had not testified falsely and it was then apparent to her that she had been mistaken in her recollection of Mr. Esbitt's questioning. Having satisfied myself that Mrs. Silva's present recollection was not at odds with her testimony I asked her if she still wanted to talk to the judge. She said no. I left her, Dr. Alizadeh and Mr. Hartwig and returned to court which was reconvening.

6. In support of the motion Kavaler submits an affidavit of one Joseph J. Hanrahan which purports to paraphrase a tape recording of a conversation between him and Mrs. Silva. This affidavit, which suggests that your deponent somehow obstructed justice, deserves little credit as the transcript is the best evidence of the conversation. Unfortunately, however, defendant has not seen fit to offer the entire transcript. We request that copies of the entire transcript, or in lieu thereof, the tape be turned over to the Government forthwith for inspection.

7. The substance of Mrs. Silva's testimony was that she had seen Kavaler at Lee Avenue During 1972 and 1973. Her testimony on direct was at best equivocable concerning whether Kavaler had worked at the clinic. As long as she testified to the best of her recollection as it existed at the time she testified, her testimony must stand and it is for the jury to credit it or not.

8. Beyond any speculations as to what Mrs. Silva's testimony would have been had she been more fully briefed by her employer prior to testifying, the short answer to defendant's motion is this is simply no new evidence. A witness, after a post-trial debriefing, decides to retract what she erroneously fancied was untruthful testimony. Neither the newer state of her recollection nor the fact that she discussed it with the Government meets the criteria of new evidence or evidence which affects her credibility so as to be classified as Brady material.

9. A motion for a new trial based on newly discovered evidence is addressed to the discretion of the trial court. United States v. Silverman, 430 F.2d 106, 119 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971); United States v. Lombardozzi, 343 F.2d 127, 128 (2d Cir.), cert. denied, 381 U.S. 938 (1965); Brown v. United States, 333 F.2d 723, 724 (2d Cir. 1964). It is not favored and should be granted only with great caution, United States v. Costello, 255 F.2d 876, 879 (2d Cir.), cert. denied, 357 U.S. 937 (1958); United States v. Sposato, 446 F.2d 779, 781 (2d Cir. 1971). The accepted criteria for the granting of a new trial on the ground of newly discovered evidence are (1) the defendant must satisfy the court that the asserted new evidence is such

and could not with due diligence have been discovered before or, at the latest, at trial, (2) the evidence must be material to the factual issues at the trial and not merely cumulative of evidence already introduced on impeaching the character or credit of a witness, and (3) it must be of such a nature that it would probably produce a different verdict in the event of a retrial. United States v. Polisi, 416 F.2d 573, 576-577 (2d Cir. 1969). Accord, United States v. Stofsky, 527 F.2d 237, 243 (2d Cir. 1975); United States v. Schwartzbaum, 527 F.2d 249, 254-255 (2d Cir. 1975).

10. The "new evidence" (i.e., a more accurate version of Mrs. Silva's recollection), could have been developed by further cross-examination at trial. It would have been a simple matter to press Mrs. Silva as to when and where she saw Kavaler. However, counsel elected not to do this. Moreover, it is not material to the factual issues -- i.e., whether Kavaler filed false claims against the Government and conspired to do so -- but only cumulative of evidence which tended to impeach Kavaler. Had Mrs. Silva returned to the stand, she would have disclosed that her recollection was refreshed by Dr. Alizadeh and one of the defense witnesses, Dawn McLean. Apart from Mrs. Silva's testimony there is ample documentary evidence that Kavaler was at Lee Avenue on at least 13 occasions to make rent payments. (See GX 71A-71G) Finally, on the total evidence of record in the case, it is inconceivable that even had the Government conceded at trial that Kavaler did not work at Lee Avenue in 1972 or 1973 that a different verdict would have been reached. It is likewise inconceivable that the jury would reach any different verdict after a new trial.

GEW:lq
d-200

WHEREFORE, the motions should be denied.

GEORGE E. WILSON
Assistant United States Attorney

Sworn to before me this

day of September, 1976.

:lnd
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK A 314

- x

UNITED STATES OF AMERICA :

- v - : AFFIDAVIT

YAX KAVALER, : S 76 Cr. 241 (CLB)

Defendant. :

- x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

JOHN E. BARTWIC, being duly sworn, deposes and says:

1. I am assigned to the Medicaid fraud investigation in the office of the United States Attorney for the Southern District of New York.

2. On July 28, 1976 I happened upon two Government witnesses in United States v. Kavaler -- Dr. Hamid Alizadeh and Mrs. Gloria Silva -- in the lobby of the United States Courthouse Annex, One St. Andrew's Plaza. Dr. Alizadeh stated that Mrs. Silva wanted to speak to the judge because she thought that she may not have stated the truth the previous day during her testimony. Mrs. Silva said she thought she had stated that Dr. Kavaler worked at the Leo Avenue clinic during 1972 and 1973 when in fact she had recalled since testifying that he did not.

3. I took them to the courthouse to speak to George E. Wilson, the Assistant United States Attorney in charge of the case. I arrived just as the court was taking a recess after the Government's closing argument and informed Mr. Wilson that Mrs. Silva wanted to speak to him and why.

4. Mr. Wilson produced the transcript of her testimony and showed it to her. He asked her what her problem was. Mrs. Silva said when the "old man" asked she said he worked there. Mr. Wilson showed her Mr. Esbitt's cross-examination in the transcript. She read it and it was pointed to her by Mr. Wilson that she had merely told Mr. Esbitt that she had seen Dr. Kavaler during 1972 and 1973.

5. After it appeared that she was satisfied that she had not lied Mr. Wilson asked her if she had anymore problems and if she still wanted to see the judge. Mrs. Silva said no. Mr. Wilson left the transcript with me and returned to court which was reconvening. I again asked Mrs. Silva if she felt better now that she had read the transcript. She said she did.

6. At no time did I or Mr. Wilson attempt to intimidate or shout at Mrs. Silva. Mr. Wilson advised Dr. Alizadeh that it was a serious offense to tamper with witnesses and that he hoped that Mrs. Silva was not trying to change her testimony because of something that Dr. Alizadeh had told her.

7. On September 14, 1976 I spoke to Dr. Alizadeh by telephone. He told me that after the trial Dr. Kavaler had called Mrs. Silva once or twice and told her that "she should say different".

JOHN E. HARTVIG

Sworn to before me this

day of September, 1976

[redacted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

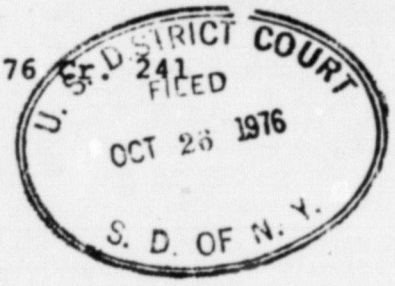
vs. :

MAX KAVALER, :

Defendant. :

----------x

[redacted]ERS



76 Cr. 241

New York, New York.
September 17, 1976 - 9:48 a.m.

Before:

HONORABLE CHARLES L. BRIEANT, District Judge.

APPEARANCES:

ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York
GEORGE WILSON,
IRA SORKIN, Assistant United States Attorneys.

WILLIAM ESBITT, ESQ.,
Attorney for defendant.

THE COURT: United States vs. Kavaler.

MR. WILSON: The Government is ready, your Honor.

We are checking to see if counsel is here.

THE COURT: Where is the defendant?

MR.WILSON: I have not seen him this morning. I have sent someone out to check the witness room to see if anyone is out there.

THE COURT: This matter was scheduled for 9:30, Mr. Wilson, and it is now almost ten minutes of 10:00, and I think we better find out where these people are.

MR. WILSON: I saw Mr. Hanrahan, Mr. Kavaler's man, in court this morning. I assumed that pos-ibly they may be out in the hall.

THE COURT: Please don't leave the floor because if they come in you won't be here.

(Pause.)

MR. WILSON: Mr. Hanrahan, perhaps he can tell the Court where Mr. Esbitt is.

THE COURT: I want to know where the defendant is.

Good morning, Mr. Hanrahan, Where is counsel?

MR. HANRAHAN: I don't know.

THE COURT: Where is Dr. Kavaler?

MR. HANRAHAN: They were all coming in together, they were coming from the Island. The only thing I can think of is they must have gotten stuck on the way in.

THE COURT: Try to follow up by telephone and see if you can find out. I will continue the matter for a few minutes more until he shows up.

MR. HANRAHAN: All right, your Honor.

(Recess.)

THE CLERK: United States of America vs. Max Kavaler.

MR. WILSON: The Government is ready.

MR. ESBITT: Ready for the defendant.

THE COURT: You gentlemen were all expected at 9:30, Mr. Esbitt.

MR. ESBITT: Your Honor, I must apologize to the Court. This is the first time we have been late in any of our previous sessions. My clients left their house at 7:00 o'clock this morning, they picked me up at a quarter of 8:00, and normally from our experience in the past we have been able to get here in a little over an hour. It took us until just now to get to the courthouse because of unusual traffic, for which I apologize to the Court.

THE COURT: I understand that those things

happen. However, by the same token, I am very limited as to my scheduling. I will take the proof with respect to the motion.

MR. ESBITT: If your Honor please, I have subpoenaed two witnesses. I will ask the clerk to call a Mrs. Gloria Silvers to find out if she is in the courtroom, or Dr. Hamid Alizadeh. Both of them were subpoenaed, your Honor, for appearance here.

I might say also, your Honor, that I have just received this morning a copy of the affidavit in opposition which I have not had an opportunity to go over.

THE COURT: I don't think you need to even read it. It is a question of fact, it is a question of credibility, and I will just have to have an evidentiary hearing on it. I don't mean to criticize Mr. Wilson's affidavit, but I think that the fair and proper approach when this kind of a charge is made is to hear the people and listen to their testimony and assess their credibility, and that's what I propose to do.

MR. ESBITT: Very good, sir. But the witnesses have been subpoenaed and they are not here. If you wish me to proceed --

THE COURT: Since the testimony of the witnesses cannot be stipulated, I will send the United States

Marshal to bring them down here.

How about it, Mr. Wilson?

MR. WILSON: I have no idea what these witnesses are going to testify to, your Honor. I think that they should be subject to cross-examination.

THE COURT: Nobody said you couldn't cross-examine them.

MR. WILSON: Well, I can't stipulate to what Mr.Esbitt wants to bring out. I might add, I called Mr.Esbitt's office yesterday and told him that the affidavit was ready and he would be served a copy by mail, we didn't think it could reach him on time. He could send a messenger down to get it. Apparently the message didn't get to him.

THE COURT: I think the sentence ought to be deferred in any event because I have not read all of the material once this motion was received, because I don't want to get a lot of extra judicial information about the defendant when I am going to be dealing with this motion.

To protect my own impartiality, I don't intend to impose sentence today, even if the motion were denied out of hand. But I want to start taking the proof. You need both of these witnesses, do you?

MR. ESBITT: Sir?

THE COURT: You need both of the witnesses?

MR. ESBITT: Yes, sir.

THE COURT: Has any effort been made to see if they were coming? You have an investigator on this case.

MR. ESBITT: Your Honor, I personally went to see Mrs. Gloria Silvers and personally served her with the subpoena yesterday, and she promised me that she would be here this morning.

Dr. Alizadeh was served by my investigator the day before, but he told me yesterday that he would not come in.

THE COURT: I will order that the United States marshal -- is that true, Mr. Hanrahan?

MR. HANRAHAN: That is correct, your Honor.

THE COURT: I will order the United States marshal to take the person of Dr.Alizadeh who is so important that he can't come in a matter that involves the liberty of the defendant in a criminal case, and I will make the same order with respect to other witnesses. I ask you also to stand by until we get these witnesses in her.

It puzzles me that a witness would impeach

her testimony and then not come down and tell the Court about it, particularly where it might affect a person's liberty. I just don't understand it.

MR. WILSON: Your Honor, I would like to ask, as I did in my affidavit, that this tape which was apparently made of Mrs. Silvers' conversation with Mr. Hanrahan be turned over to the Government for inspection and copying.

THE COURT: What good is the tape? It is no different than counsel's work product. You can't cross-examine a tape.

MR. WILSON: Mr. Esbitt has included in his motion a portion --

THE COURT: I can't decide this motion based on a tape. Get the witnesses in here and let them testify.

MR. WILSON: He made a partial transcript part of the record.

THE COURT: I will strike it out of the record, Mr.Wilson. Mr.Esbitt has only introduced the tape in order to reach a threshold so the Court would give him an evidentiary hearing. Mr. Esbitt knows these matters can't be decided on affidavits or tapes. Am I right on that?

MR. ESBITT: Yes, sir. That is why I requested the hearing, your Honor.

THE COURT: You are entitled to a hearing. Get those witnesses in here. In the meantime, everybody will stand by, and I will just fit it in as soon as I can get the distinguished doctor who said he wouldn't come.

I might say to you that the minute he said he couldn't come -- the moment that this doctor said he wouldn't come, this Dr.Alizadeh, it seems to me you should have notified the Court. I would meet him at the office in the morning with a U.S. marshal and drag him down here.

MR. ESBITT: He said he would not come, but he also said he has been in communication with Mr. Wilson, so perhaps Mr. Wilson knows where he is or why he is not here.

THE COURT: Have you talked to Dr. Alizadeh?

MR. WILSON: Yes. As a matter of fact, I spoke with him either yesterday or the day before, and he complained that someone posing as a doctor had served a subpoena on him, apparently that is Mr. Hanrahan, and he is very upset.

THE COURT: Do you have to pose as a doctor

to serve a subpoena?

MR. WILSON: That is what happened.

MR. ESBITT: That is what he said happened.

MR. WILSON: He is your witness. I don't know about his credibility. In any event, he said "Do I have to come, I have a subpoena?"

I said, "Were you given a subpoena?"

He said, "Yes."

I said, "You have to come. That is an order of the Court."

He said, All right, I will be there."

THE COURT: Why don't you do us a favor, call him up, let Mr. Esbitt sit with you while you do it, and tell him the Court is sending a marshal for him, the marshals have other things to do, and if he hasn't got a good excuse for a non-attendance, I am going to fine him when the hearing is over.

GEt on the phone. Get that man down here. The same with the other witness. The two of you cooperate, Mr.Esbitt, work together in the interests of justice to get these witnesses down here. Otherwise they will be arrested.

MR. ESBITT: Your Honor, we subpoenaed them to have them down here. We are surprised and

shocked that they aren't here.

THE COURT: I am shocked too, at them.

We will be in recess until you have a witness.

(Recess.)

THE COURT: The Court notes that the witnesses subpoenaed by the defendant are now present in the courtroom, both of them.

MR. ESBITT: May we have all witnesses or potential witnesses excluded from the courtroom, your Honor?

THE COURT: If I do that, what will I do with Mr. Hanrahan? Who else is there?

MR. ESBITT: I will withdraw the request.

THE COURT: Wait just a moment. Maybe there are none.

MR. WILSON: I will join in that request that the witnesses be sequestered, and I think Mr. Hanrahan should be a witness and I plan on calling Mr. Hartwig.

THE COURT: Who is Mr. Hartwig?

MR. WILSON: An investigator attached to our office.

THE COURT: The witnesses are sequestered.

Who is it that you are going to call first?

MR. ESBITT: I want to call Mr. Wilson first as my first witness.

THE COURT: If that is the case, he will have to send for an Assistant U.S. Attorney to represent the Government, so call somebody else. Did you notify him you were going to call him?

MR. ESBITT: No, sir. It is perfectly obvious from the motion papers that he must be a witness, your Honor.

THE COURT: Not necessarily. Call one of these working witnesses so they don't lose time from work.

MR. ESBITT: All right. Mrs.Gloria Silvers.

MR. WILSON: Can I have a moment, your Honor? I have to see if I can get somebody to come over here.

THE COURT: Yes.

G L O R I A S I L V E R S, called as a witness by the defense, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ESBITT:

Q Mrs. Silvers, will you speak up just a little bit louder so I can hear you and the Judge can hear you and Mr.Wilson can hear you.

Mrs. Silvers, you testified at the criminal trial of dr. Max Kavaler in July of this year, did you not?

A Yes, I did.

MR. ESBITT: Your Honor, I offer in evidence the testimony of Mrs. Silvers during that proceeding.

THE COURT: Received in evidence.

xxx (Defendant Exhibit A was received in evidence.)

Q That was on Tuesday, July 27, 1976, was it not?

A Yes.

Q Would you speak up a little louder?

A Yes.

Q After you testified, what did you do?

A After I testified here?

Q Yes. You left the courthouse?

A I left the courthouse, yes.

Q With whom did you leave the courthouse?

A I left with the doctor and the doctor and the young fellow that came to get me in the office.

Q Do you know his name?

A No, not offhand.

Q Do you see him in the courtroom?

A He was just here with a beige suit, glasses.

MR. ESBITT: Is that Mr. Hartwig?

MR. WILSON: You are directing the question to me?

MR. ESBITT: I am asking you --

THE COURT: Please don't have cross colloquy between counsel. Who was the person who took you home?

THE WITNESS: I left the courtroom with Dr. Alizadeh, and the man who came to pick me up at the office that told me to come here.

Q Did you go back to your office on Lee Avenue in Brooklyn?

A Yes.

Q With whom did you go back?

A I went with the doctor, we took a cab back.

Q Is that Dr. Alizadeh?

A Yes.

Q He is your employer?

A Yes, he is.

Q Did you have a discussion with Dr. Alizadeh on the way back to your office in the taxicab?

A Yes. I spoke to him.

Q What did you say to him?

A Well, I was a little upset --

THE COURT: No, just what did you say to him?

THE WITNESS: I said I think I made a mistake as far as the years were concerned, which is

'72 and '73, the way the question was put to me.

Q When you went back to your office, did you do anything?

A I went home after that.

Q Did you talk to anybody back in your office about the records that you had testified about?

A No.

Q What did you do the next morning?

A The next morning I called my attorney, Joseph Perrini --

Q Your attorney is Joseph Perrini?

A Yes.

Q You had a conversation with him?

A Yes.

Q What was your conversation? What did you tell him and what did he say to you?

A I told Joe that I was very upset, that I think I made a mistake on the way I answered the question, and that I would like to retract it or fix it, was there any other way -- any way to do that. I wasn't sure how you go about doing that or if you could do that.

Q What did Mr. Perrini, your lawyer, say to you?

A He said if I felt that I made a mistake and I am telling the truth, I should come back to court early

in the morning, if possible, and see the Judge, whoever was the Judge at that time.

Q Did you do that?

A Yes, I came back here.

Q Did you come back alone or did you come back with somebody?

A Dr. Alizadeh kept me company.

Q Came back with you?

A Yes.

THE COURT: How did you come down, did he bring you down?

THE WITNESS: Yes, he did.

THE COURT: In a taxi?

THE WITNESS: No. I went to the office and from there he drove down.

THE COURT: In his car?

THE WITNESS: Yes. I come from Staten Island. I drive into Brooklyn and then we came down here.

THE COURT: You and Dr. Alizedah together?

THE WITNESS: Yes.

Q Where did you go when you came back to this courthouse or to this neighborhood?

A We parked the car somewhere in a building and we were trying to find the room we were in when they

brought me here the first time, so we came in some side entrance and we signed there -- rather he signed.

Q A sign-in book?

A Yes. Then about that time I saw the same fellow that --

Q You saw what same fellow?

A The man that came to the office, that came to the office and told me to come here.

Q Was he a Government agent?

A Yes.

Q Was he the Government agent who picked you up, picked you and Dr. Alizedah up at the place of your business the day you testified?

A Yes.

Q And brought you to the courthouse?

A Yes.

Q That was the young man you saw the following day when you were looking for the Judge?

A Right.

Q Do you know his name?

A No, not offhand.

Q Did you speak to him?

A He was surprised to see --

THE COURT: No, just answer the question.

THE WITNESS: Yes, I did speak to him, yes.

Q What did you say to him?

A I told him I wanted to come back upstairs, talk to someone about what I had said.

Q Did you tell him what --

A Yes.

Q What did you tell him?

A I told him I felt I made a mistake when it came to the length of time that the doctor was working, the years, rather.

Q Did you tell him that in front of Dr. Alizedah?

A Yes, I did.

Q He was with you at the time?

A Yes.

Q Was this down at the place where you signed in?

A Right.

Q What happened next?

A Well, he brought us upstairs and he brought us back to the room which we were in the first time.

THE COURT: In this building here?

THE WITNESS: Yes.

Q You mean the witness room?

A Yes.

Q Describe the room.

A It has a long table, wood table, with chairs around it. That is all.

Q That was the room you were in before you testified at the trial?

A I think it is the same room, yes.

THE COURT: Who was present in the room when you entered the room?

THE WITNESS: Well, I entered the room with Dr.Alizadeh and the young fellow and no one else was there.

Q What happened next?

A We waited a while, and then this man came in.

Q This man, you are pointing to Mr. Wilson?

A Yes.

Q He came in?

A Right.

Q What did you say to him? Who spoke first when Mr. Wilson came in? Did Mr. Wilson speak first or did you?

A I don't recall.

Q What was said?

A Well, I told him what I came -- I told him I wanted to change what I had said, that I felt I made a mistake, that Dr. Kavaler did not work in '72 or '73,

some other doctor was working at that time.

Q You said that to Mr. Wilson?

A Yes.

Q What did Mr. Wilson say?

A He said, "We never asked you that question."

Q He said that he had never asked you that question?

A Right.

Q What else did he say?

A He said what he had asked me was did I see him in '72 and '73.

Q And what did you say?

A Yes, I did see him in '72 and '73, about maybe that time, but he wasn't working.

THE COURT: Where did you see him?

THE WITNESS: He came up to the office to borrow something.

THE COURT: That was in the Lee Avenue clinic?

THE WITNESS: Yes.

THE COURT: You saw him there?

THE WITNESS: Right.

Q After you said that to Mr. Wilson, what was said next?

A Well, he showed me a book containing I guess

the questions and answers that they had asked me, and that question wasn't there, you know.

Q You didn't see it in the book?

A No. It just said did I see him, and I answered, you know.

MR. WILSON: I am sorry, I couldn't hear the answer.

(Record read.)

THE COURT: You answered that you had seen him?

THE WITNESS: Yes.

THE COURT: That was truthful?

THE WITNESS: Right, yes.

Q What happened next?

A He asked me if I had any other changes to make. I said no, I had nothing else to change. All I wanted to do was just fix that up about the year, '72 and '73, and that is all I said to him.

Q Did you say anything to him about the records?

A Oh, the papers which they took from me, those papers?

Q Yes.

A Yes. I told him that if they look back in those papers, they might see Winston's name in parenthesis in red ink. I had written a name down there, but I

wasn't sure what it was, whose name it was, until I remembered Dr. Winston was probably working at that time, and that's why I was receiving payments for him. It is written there.

Q What happened next?

A We just had -- he did keep asking me did I want to make any other changes. I said no. Then he said did I speak to Yvonne or the doctor, that I came up here today.

Q When he mentioned the name Yvonne, you know who Yvonne is?

A Yes, I know who she is.

Q What is her last name?

A I don't know the last name. I just know the girls by first name.

Q She works for Dr. Kavaler?

A Yes.

THE COURT: Is that person whom you know as Yvonne here in the courtroom today?

THE WITNESS: Yes. She has a black suit on.

THE COURT: She will be excluded also.

Go to the witness room.

Proceed, Mr. Esbitt.

Q When Mr. Wilson asked you whether Yvonne had

called you, you said no?

A Right. Yes.

Q Did Yvonne call you before you came down to the courthouse the next day?

A No, not before.

Q I can't hear you.

A No, she didn't.

Q Did he ask you whether Dr. Kavaler had called you before you came down?

A Yes, he did.

Q What did you say to Mr. Wilson?

A I said no, the doctor has never called me.

Q Had Dr. Kavaler called you?

A No.

Q What happened after that, after that conversation with Mr. Wilson?

A Nothing happened after that. We left.

Q Did he take you to see the Judge?

A No.

Q Did he tell you to go home?

A He said if there was no other changes, you know, to be made on that, whatever it was in the book, that I could leave.

THE COURT: You say "other changes." What

changes were made?

THE WITNESS: I mean there wasn't any other -- in other words, if I just came up for that one thing, I told him about it, and that was it.

Q Did he ask you to make any statement, any written statement? Mr.Wilson, did he ask you to make a written statement?

A No.

Q Did he ask you to sign anything?

A No.

Q Subsequent to that and some time in August, were you approached by Mr. Hanrahan? You know who Mr. Hanrahan is, do you not?

A I don't know anyone by their names.

Q You have seen him? You saw him in the court-room today?

A Yes, I did.

Q Had you seen him in August and he taped your statement?

A Yes.

THE COURT: Are you attempting to impeach her testimony here today?

MR. ESBITT: Sir?

THE COURT: Are you attempting to impeach

her testimony?

MR. ESBITT: No, sir, on the contrary.

THE COURT: Then I don't care about the Hanrahan contact.

Q Is it a fact, Mrs.Gloria Silvers, that from your knowledge Dr. Kavaler did not work in the Lee Avenue clinic in 1972 or 1973 or 1974?

MR. WILSON: Objection. It is not relevant, what her present knowledge is. It is what her knowledge was at the time she testified.

THE COURT: It may be relevant, but I would like the question separated both as to the time she testified and as to the present moment in time.

MR. ESBITT: I am sorry, I didn't hear your Honor.

THE COURT: Separate the question. Ask her whether she knew on the date she testified and ask her what she knows today. Two separate issues.

Q At the time you testified did you know then that Dr. Kavaler did not work in 1972?

A Did I know if he was working in '72?

Q Yes.

A No, he wasn't working --

THE COURT: When you say "working," we are

talking about working at Lee Avenue, is that right?

THE WITNESS: Right.

THE COURT: You are telling us now that you knew on the day you testified --

THE WITNESS: The question was --

THE COURT: Wait just a moment, Mrs. Silvers, It is important. Please listen to the question.

Do I understand that you are telling me now that at the time you testified here before the jury in Dr. Kavaler's trial that you knew that Dr. Kavaler had not worked at the Lee Avenue clinic during the years that Mr.Esbitt just mentioned?

THE WITNESS: No. I thought he was working there at the time, when I was testifying, yes.

THE COURT: Did you know?

THE WITNESS: I was confused with the dates. I can't remember from 1971, '72, '73. It is very hard for me to remember.

THE COURT: But now you remember?

THE WITNESS: Yes.

THE COURT: Go ahead.

BY MR. ESBITT:

Q Is the same true for 1973?

A Right.

Q And for 1974?

A He was not there in '74.

Q That was the reason why you came down to the courthouse the following day?

A Right.

MR. ESBITT: I have no further questions.

THE COURT: Is there any cross-examination?

MR. WILSON: Yes.

CROSS-EXAMINATION

BY MR. WILSON:

Q Mrs. Silvers, were you ever threatened or intimidated by anyone in this courthouse, either myself or anyone working for me?

A No.

Q Did anyone yell at you?

A No, I wouldn't say yell.

Q Pardon me?

A No. Not yell, if you speak above -- if you speak too loud to me,that is yelling. It depends what you call yelling.

Q If someone speaks in a loud voice --

A I might get, you know --

Q So what you are talking about is that someone spoke to you in a loud voice?

A Yes.

Q But there was no anger, was there? Was anyone angry with you the day you came back?

A No.

Q Was I angry with you?

A I felt maybe you were annoyed. I don't know. Something like that. You weren't --

THE COURT: What did he say that made you think he was annoyed?

THE WITNESS: He just spoke loud, that's all, and I was upset. I was very nervous that I had to come back and do this, you know, that's all.

Q So you were upset and I spoke loud and you were a little bit upset because I spoke loud?

A Right.

Q But were you threatened or told you would be thrown in jail or accused of lying, or anything like that?

A No.

Q You were present when I spoke to Dr. Alizadah?

A Yes, I was.

Q Do you recall I cautioned him that it is an extremely serious matter to tamper with a witness?

A Right.

Q And he acknowledged that he had not done so,

and he had not talked to you about this matter?

A Right.

THE COURT: When did this occur? Was this before or after you first spoke with Mr.Wilson?

THE WITNESS: After I spoke to Mr. Wilson.

Q This occurred in the room the time you --

A Yes.

THE COURT: After you said there was nothing else you wanted to correct or before?

THE WITNESS: No. When he first came in. Now, wait. I don't remember when it was. All I know -- I can't remember exactly.

Q When I first came in the room, I spoke to Dr. Alizadeh and I asked you what you thought it was you testified falsely about?

A That's right, yes.

Q Do you recall that you said that you thought you had answered the old man's questions incorrectly?

A Right.

Q Do you recall referring to one of the people who asked you questions as the "old man"?

A Well, the older man.

Q The older man, all right. Touche. Were you shown a copy of your testimony in answer to those questions,

in the book?

A Yes, you did.

Q Did you read it?

A Yes.

Q Did you find anything there that was at odds with what your recollection was that morning?

A No.

Q You weren't upset?

A What was that?

Q You weren't upset any more?

A When I left I wasn't upset.

Q Isn't it a fact that when you came to the courthouse, you came with the idea in mind that you thought you had testified differently than was actually in the book?

A Right.

THE COURT: I didnt hear the answer.

THE WITNESS: Yes.

Q And you were shown the transcript?

A Right.

Q And after looking at the transcript, you were satisfied?

A Yes.

Q And you recall examining the transcript in

answer to my questions, you recall you testified for several minutes about records, and we took papers and put them in evidence, and then you were asked a few questions, do you know Dr. Kavaler, had you seen him at the clinic, and do you recall at that time saying that you weren't sure if he worked there in '72 or '73 or he worked there in '72 and '73 you weren't sure, do you recall that?

A Yes.

Q At the time you testified you were actually sure if he worked there in '72 or '73?

A No, I wasn't sure.

Q So you weren't lying then, were you?

A No. I couldn't remember that far back, really.

Q Then you were asked another question, his last payment was in '74, could he have worked in '73, and you replied, "Could be, " or "could have," do you remember that?

A Right.

Q That wasn't a lie, was it?

A I didn't feel I was lying at the time.

Q That was your recollection?

A Yes.

Q That was your honest recollection under oath

at that time, is that right?

A Right.

Q After, later on, you thought, "Well, I was wrong in saying that he might have, and he really didn't"?

A Right.

Q And after reading that transcript, did you feel that you had lied in any respect or were inaccurate?

A Not when I read the book you gave me.

Q After you read the book you were satisfied?

A Yes. I wouldn't have left.

Q Do you recall being asked by me just before I left the room, "Do you still want to see the Judge?"

A I don't remember.

Q Do you recall talking about the Judge?

A I don't know if I brought up the Judge or not.

Q Did you come down to see the Judge or did you come down to see Mr. Esbitt or myself?

A Yes. He told me to come down and speak to the Judge.

Q Do you recall being asked before you left the courthouse after having read the book if you still wanted to talk to the Judge?

A I don't remember.

Q You don't remember?

A No.

Q You could have been asked that?

A I could have, yes.

Q But if you wanted to see the Judge, you wouldn't have left, is that correct?

A Well, when I came back and I saw in the book it wasn't the way -- the question wasn't put the way I thought it was, though someone had asked me that question some time, otherwise it wouldn't have been in my mind. Someone did ask me did he work in '72 and '73, and I think I said yes, which was wrong. That is all I came up --

Q Could it have been before you testified in court that somebody asked you questions --

A No, no. I had no idea I was going to even be involved in this.

THE COURT: How old are you?

THE WITNESS: I am 40.

THE COURT: How far did you go in school?

THE WITNESS: First year of college.

THE COURT: You have finished one year of college?

THE WITNESS: Right.

THE COURT: You are employed, what, principally as a bookkeeper, are you?

THE WITNESS: No, administrator.

THE COURT: Administrator of a clinic?

THE WITNESS: Yes.

THE COURT: How long have you been administrator of a clinic?

THE WITNESS: Seven years.

THE WITNESS: Generally what do you do as administrator?

THE WITNESS: I didnt start as doing that. I started doing general office work, and then eventually I started organizing the office for him, which needed a lot of organizing.

THE COURT: How many people work under you?

THE WITNESS: Now, at least 15, right now.

THE COURT: How many subordinates is the maximum you have ever had?

THE WITNESS: About 17 or 18.

THE COURT: Is there anything more?

MR. WILSON: Yes, your Honor.

BY MR. WILSON:

Q I just want to show you, Mrs.Silvers, this transcript again and ask you to just read these last three pages, referring to page 1281, at the top we are talking about exhibits. If you would, just read these last

three pages, and tell the Court if there is anything in there -- first of all tell the Court, is that the transcript you read the day you saw me in the room?

THE COURT: I think you are wasting time, Mr. Wilson.

THE WITNESS: I really couldn't remember off-hand all these questions and answers.

THE COURT: Go on to something else. You have a doctor waiting outside who would like to get back to his patients.

Q Mrs. Silvers, between the time -- you testified before that between the time you testified in court and the time you came back the next morning you didn't talk to anyone except your lawyer about your testimony.

A And Dr.Alizadeh.

Q You didn't receve any phone calls from anyone?

A No.

Q After you came back the next day, from that time on to the time you were interviewed by Mr. Hanrahan, were you contacted by the defendant?

A The doctor?

Q Yes, Dr. Kavaler.

A Yes.

Q Isn't it a fact that he called you?

A Yes.

Q And said you should change your testimony?

A No, he didn't say I should change my testimony.

Q What did he say to you?

A He said what happened when I came up here.

Q He knew you came up here?

A Yes. He must have known through Yvonne, because Yvonne wanted a letter stating his character reference, or something like that.

Q Dr. Kavaler's character?

A Yes.

Q From you?

A A letter, yes.

Q Yvonne called you and wanted a letter?

A Yes. She called the office.

Q Did she call other people at your clinic?

A Yes.

Q Did she call Dr. Alizadeh?

A Yes.

Q She was searching for letters of Dr. Kavaler's character?

A Yes.

Q Did you give her that letter?

A No.

Q Did she discuss with you did you tell him you had come the next day?

A Yes.

Q Then Dr. Kavaler called you?

A He called me up -- you mean at about the same time or later?

Q After you had the conversation with Yvonne, thereafter did Dr. Kavaler call you?

A Not about the same time, no. Later on.

Q How much later?

A I don't know. A few days, two, three days.

Q What did he say to you?

A He said -- I think he brought -- he said something about "I heard that you had gone up to change your testimony,"you know, and "what happened?"

So I told him I came up and what happened. He said to me, "Would you be willing to repeat this to my lawyer," or whoever. I said, "Yes, why not?"

Q Did you tell him that you had looked at your testimony and you had left and you were satisfied that you had not said anything untrue?

A No, I don't think I said that.

Q What did you --

A I don't recall exactly what I said to him, you know, word for word. I just said what happened, that's all.

Q Did you talk to him again after that?

A When he came to my house.

Q When he came to your house?

A Yes.

Q When did he come to your house?

A To make the tape.

THE COURT: Who is this that came?

THE WITNESS: Dr. Kavaler, that other man.

Q Mr. Hanrahan?

A Yes.

THE COURT: The two of them came together?

THE WITNESS: Yes, and two women.

Q Who were the women?

A I have never seen them before. He just introduced me to them.

THE COURT: Who else was present at your home at that time when you met with this group of four people?

THE WITNESS: My daughter, her girl friend.

THE COURT: How old is your daughter?

THE WITNESS: She is only 13.

THE COURT: Her girl friend is the same age?

THE WITNESS: Younger, probably.

Q Who asked you the questions.

A The other man.

Q Mr. Hanrahan?

A Yes.

Q Did he suggest any answers you should give or did he kind of ask questions --

A No. He just pointed out to me that that was a tape recorder, and all I should do is tell the truth to any question he asked me.

Q Did he refresh your recollection in any way as to what had happened before?

A No. He didn't say much to me. He just explained to me about the tape recorder and what it was and what it was going to be probably used for.

Q How long did this tape recording last?

A I can't recall. I don't know.

Q Was it two minutes or five minutes?

A No, it was longer than that.

Q An hour and a half?

A No, I don't think it was an hour and a half. I don't know.

Q Was it an hour? It is important. Try to remember as best you can recollect.

A Maybe a half hour, or something. I am not sure.

Q Half hour. Did you tell Mr. Hanrahan or Dr. Kavaler or anyone else that you had lied when you testified in court?

A I never used the word "lie."

Q Did you tell him that you testified incorrectly or inaccurately?

A Yes, that I felt I did. Someone asked me a question, did he work '72 and '73 -- I don't remember who it was -- and I might have answered wrong. That is all I said.

Q You might have answered wrong?

A That he was working '72 and '73, I think that was the answer that I had given.

Q Did you tell him you looked at the transcript and you were satisfied?

A I don't recall much what I talked about that day with him. I was anxious to get to work.

Q You said that Dr. Kavaler had come to the clinic to get Dr.Alizadeh's invoices and prescriptions. Did he take blank invoices or copies of invoices or what?

MR. ESBITT: If your Honor please, I think that is purely irrelevant as to what Dr. Kavaler --

THE COURT: It may not be irrelevant, because-- I don't think I have to expound the theory. I will overrule the objection.

Q What kind of invoices did you give Dr. Kavaler?

A Plain invoices that you take right out of a package ready to use. Sometimes offices don't get them on time.

Q What about prescription blanks, what would a chiropractor need with a medical doctor's prescriptions?

THE COURT: Don't give argumentative questions, Mr.Wilson. I want to get finished.

Q Did you give him prescription blanks?

A I remember giving him invoices, I don't know. I probably gave -- I don't remember that too well right now if I did or not.

Q You could but you are not sure now?

A Yes. Or prescriptions.

THE COURT: I couldn't hear you, Madam.

THE WITNESS: I was talking to myself at this point.

MR. WILSON: That is all I have.

REDIRECT EXAMINATION

BY MR. ESBITT:

Q When you were being asked by Mr.Wilson on the morning of the -- on the day you came back after you testified and he showed you a book which apparently was your testimony of the day before, and he said "Do you see anything wrong there," you kept -- isn't it a fact that you kept telling him about the years' 72 and '73 , I know my testimony was wrong? Isn't that what you told him?

A That's what I came up for, yes.

Q And you told him that?

A Yes.

Q And you told him that after he had shown you the transcript?

MR. WILSON: Objection.

THE COURT: It is leading.

Q Is that right? Did you tell it to him after he had shown you this transcript?

A I kept repeating myself, the reason why I came up was I felt I made a mistake saying that Dr. Kavaler worked '72 and '73, which he didn't. Later on I realized he didn't. Dr. Winston did, and that was it.

MR. ESBITT: That is all.

THE COURT: Anything else for this witness?

MR. WILSON: One question.

RECROSS-EXAMINATION

BY MR. WILSON:

Q When you testified, you testified truthfully and to the best of your recollection?

A Yes, I did.

Q The testimony that you were most worried about is that you recalled telling me that you had told in answer to someone's question that Dr. Kavaler had definitely worked in '72 and '73?

A I don't remember if it was you or someone else who asked me that question. I don't recall who asked me that question. All I know is I think someone asked me that question and I answered. I don't know if it was him or you or anyone else at that time.

THE COURT: The record may indicate that the witness was pointing to Mr.Esbitt when she said "him."

Anything else for Mrs.Silvers?

MR. WILSON: The only last question I have is --

Q You weren't worried about the answers you gave which were equivocal, that is you thought so, or maybe, you were worried about the answers that you gave which were definite, is that correct, where you said

definitely you saw him in '72 or you thought you said he worked there in '72 and '73?

A Seeing him and saying that he worked is two different things. I think I was asked the both questions. I wasn't sure, you know, what it was.

MR. WILSON: I would just ask that the last question, your Honor, the witness be allowed to read those three pages and tell the Court if there is anything there that the witness didn't see --

THE COURT: The witness didn't testify that she testified falsely at the trial. Quite the contrary. The witness has testified that she testified truthfully at the trial. There has been no showing that any particular answer to any question is false. It seems to me clear that this witness believes that she testified she saw him working there during these years in question, when it also seems clear that she never testified that, she testified she saw him there. Seeing him there is different than seeing him working there. He may have been working there, if he was getting invoices out of the files.

MR. WILSON: Precisely.

We have no further questions.

MR. ESBITT: I would bring to your Honor's

attention --

THE COURT: Do you have anything more for the lady?

RE-REDIRECT EXAMINATION

BY MR. ESBITT:

Q Is it not a fact that you were confused at the trial that Dr. Kavaler had been there in '72 and '73, had actually been there and had been working there?

MR.WILSON: Objection to her state of mind at the trial.

THE COURT: Sustained. It is her answers that count, not her state of mind.

MR. ESBITT: I have no further questions.

THE COURT: As far as I am concerned, there is no need for anything further.

MR. ESBITT: One other one, I am sorry, Judge.

Q When Yvonne called you, how long after the trial was over was that?

A I don't recall. She called me to tell me that he was found guilty and can I give a letter to his --

Q Do you know when that was, how long after the trial?

A I don't know how long it took before -- I don't know how long that took before they decided, if it

was a day or two.

Q But it was after the trial was over?

A Yes.

Q That Yvonne called you?

A Yes. She said he was found guilty, and, "Gloria, do you think you could give me a letter stating his character," or whatever.

Q In that conversation after the trial was over was when you told her that you realized that you had made a mistake with respect to your testimony?

A Well, I started to tell her -- yes. I started to tell her that I would rather not give the letter because I didn't know him that long, you know, and I said, "Look, I have gone through all this, I went back and I am very upset about the whole thing."

Q That was the first time that you told Yvonne or anyone else that you had gone back the next day? Is that right?

A What was the question?

Q In that conversationthat you had with Yvonne after the trial was over, that was the first time that you told Yvonne or anyone else that you had come back to the courthouse the next day?

A Yes.

Q To change your testimony?

A Yes.

Q That was the first time Yvonne found out about it?

A Right.

Q And after you told that to Yvonne is when --

MR. WILSON: Objection, counsel is arguing with the witness.

THE COURT: He is not really arguing with the witness. It is leading. We had all this before.

Q After you told that to Yvonne, it was after that date that Dr. Kavaler called you and asked you to put it on tape, is that right?

A Yes.

MR. ESBITT: That is all.

THE COURT: May the witness be excused?

MR. ESBITT: Sir?

THE COURT: I am asking both counsel whether the witness may be excused.

MR. ESBITT: As far as I am concerned, yes.

MR. WILSON: I would prefer she stay in the witness room until after the hearing is over, your Honor.

THE COURT: Please return to the witness room.

(Witness excused.)

THE COURT: Mr. Esbitt, in view of the testimony of this witness, which I have just heard, I am going to ask for an offer of proof from Dr. Alizadeh before you bring him out here and have him testify, because I recognize that he is taking care of the patients up there.

What he proposes to testify may not be in dispute now. What is it he has offered to prove?

MR. ESBITT: To confirm the fact that on the trip back after this witness had testified, that she remarked to Dr. Alizadeh that she was confused and realized that her testimony was not accurate as to when he worked and that he picked her up the following morning and took her down to the courthouse for the purpose of seeing the Judge or seeing somebody, and that she did make these statements to Mr. Wilson in his presence.

THE COURT: Any dispute about that, Mr.Wilson?

MR. WILSON: No, your Honor.

THE COURT: I will take that offer of proof. I am prepared to find that it occurred just as you say, Mr. Esbitt. That is what she told Alizadeh and that is what Dr. Alizadeh did.

MR. ESBITT: I call Mr. Wilson as my next witness.

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MR. WILSON: I would like to add to Mr. Esbitt's offer of proof, that if Dr. Alizadeh was cross-examined, he would state that he recalled hearing Mrs. Silvers asked if she still wanted to see the Judge, and he would corroborate Mrs. Silvers' testimony that she was satisfied after reading the transcript that she indeed had not said anything untrue.

MR. ESBITT: I can't stipulate.

THE COURT: She so testified this morning, didn't she, Mrs. Silvers?

Do you disbelieve her?

MR.ESBITT: No, I don't disbelieve her at all. I disagree with your Honor as to the interpretation of what the witness said. I think the witness made it clear, at least to my judgment, that when she was all finished, she still reiterated to Mr. Wilson that her testimony about '72 and '73 was incorrect.

THE COURT: I don't understand her to even say that this morning.

Bring in Dr. Alizadeh. Let's get down to that point.

H A M I D A L I Z A D E H, called as a witness by the defense, being first duly sworn, was examined and testified as follows:

THE WITNESS: My address is 1668 Lee Avenue, Brooklyn, New York, 11211.

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MR. ESBITT:

Q Doctor, would you speak up a little louder so I can heard you. I am a little deat. You testified at the trial of Dr. Kavaler, did you not?

A Yes, I did.

Q You know that Mrs. Gloria Silvers also testified the same day?

A Yes.

Q Mrs.Gloria Silvers works for you?

A Yes.

Q As administrator?

A Yes, sir.

Q How long has she been in your employ?

A Since 1970, approximately, I assume.

Q On the day of the trial, after you had testified and after Gloria Silvers had testified, you went back to the office with Gloria?

A Yes, the same car.

Q In a taxicab?

A Yes.

Q Did she make any comment or observation to you or say anything to you about her testimony?

A Yes. Right here she said maybe she said something which was not right, right when we -- when she came out, right when she came out she said something.

THE COURT: Who was there when she said that, Doctor?

THE WITNESS: Jack was there.

Q Who?

A What's his name, Jack. One of the --

Q The Government agent?

A The Government agent.

Q He was in the room when she said --

A I don't know if he heard it or not, but I know --

THE COURT: Who else, Doctor, was there?

THE WITNESS: Nobody else was there. She told me something and I said to her " Just say what you know. If you don't know, say you don't know."

So when we went in the office, she was still unhappy.

Q She was unhappy?

A About what she may have said something which was not right.

Q She said there was something that was not right. Did she tell you what was not right about her testimony?

A I don't recall that.

Q Did she say that when she talked about '72 and '73 that she realized that he had not worked in '72 and '73?

A Maybe, yes. She said something about it, but I can't say exactly because I don't remember. But maybe it was '72 or '73. I said to her, "You tell them what you know. If you don't know, say "I don't remember, you will have to look in the books."

Q You will have to look in the books?

A In the books. The only way we know is the books, is our only way.

THE COURT: When did you tell her this, Doctor?

THE WITNESS: On the way in the cab.

THE COURT: After the trial, after her testimony was over?

THE WITNESS: Yes, sir. She came out of here and she said, "I don't know if I said something right or not right." She repeated herself and on the way I

told her, "You just mention what you know or you don't know, because you don't know what you did yesterday. You don't remember. How do you remember five years ago?"

Q Did she look in the book when she got back to the office?

A No, sir. She went to her room. I don't know if she did or not, that I don't remember.

Q Did you come down to the courthouse the next day with her?

A Yes. She called me the morning --

Q She called you the following morning?

A The following morning or the night, which is irrelevant, but she did call me and say, "I will have to go, maybe we can go and straighten it out."

Q Go and straighten it out?

A Yes. Then she came to the office. She said, "I have to go with her."

Q She asked you to go with her?

A With her because she doesn't know how to get --

THE COURT: She doesn't know what?

THE WITNESS: How to get here from Brooklyn with the traffic, how to get here to the courthouse.

THE COURT: She doesn't know how to get from

the clinic --

THE WITNESS: From the clinic to the court-house.

THE COURT: To Foley Square?

THE WITNESS: Yes.

THE COURT: This lady who has completed one year of college doesn't know how to get from the clinic to the courthouse?

THE WITNESS: She was very nervous.

THE COURT: You ought to see some of our jurors who don't know anything and they find their way here.

THE WITNESS: I volunteered to come with her.

Q What time was that?

A Maybe between 8:30 and 9:30.

Q You came with her?

A Right.

Q Where did you go, was it this building or the next building?

A We went to the next building, to Federal Building.

Q The U. S. Federal Building?

A Right. Then we met the agent.

Q Before you met did you sign in?

A Yes.

Q You did?

A We both did.

Q You both signed the book?

A Right.

Q It was about 9:30 in the morning?

A Approximately.

Q Whom did you see then?

A We met on the elevator or on the way, the agent.

Q The agent who had picked you up the day before?

A Yes, right, exactly.

Q What was said to him? Did he ask you or did you speak to him?

A No. Gloria talked to him and he directed us to this place.

THE COURT: Gloria is Mrs. Silvers?

THE WITNESS: Yes.

Q Did he go with you?

A Yes.

Q So this agent went with you and Gloria?

A Right.

Q Did he ask Gloria anything or did Gloria say anything to him?

A No. Gloria explained to him why she was

was here.

Q What did she say to him as her explanation?

A I don't remember because I was at this time behind, I didn't approach them. Then if you want me to explain further, the agent got in touch with Mr. Wilson, and from there on --

Q Then Mr. Wilson came here?

A Right.

Q What was said to Mr. Wilson when Mr. Wilson came?

A The Government agent explained to Mr. Wilson and Mr. Wilson had some books and showed to Gloria. I was not --

Q What did the agent say to Mr. Wilson?

A I don't know. He went out, he went to get Mr. Wilson. So whatever he said, he was not in the same room so I wouldn't know.

Q Very good. Mr. Wilson came in?

A Right.

Q What did Gloria say to Mr. Wilson and what did Wilson say to Gloria?

A I don't know. He had some book showed to her, and he had some books.

Q A book?

A That was written what Gloria said the day before. They had some talk with each other and she looked at the book.

Q Did you hear that conversation?

A No, I was sitting, mind my business. I mind my bus..ness. I was sitting in the same room but I didn't hear what they said. If I said something, I wouldn't recall to say anything, because I don't remember what they said.

Q YOu didn't hear the conversation?

A I know why she came there so I had no reason to listen what they have to say.

Q You didn't hear the conversation?

A No.

Q Did you hear anything that Mr. Wilson said to her?

A I know that Mr. Wilson came in -- that is all what I remember, that Mr.Wilson came with the Government agent together with a book, and Mr.Wilson explained to Mrs. Silvers what she said and what does she want to know, and then she look in the book. That is all I know.

Q That is all you know?

A So I don't know if there was any more conversation. I wouldn't recall.

Q Did Mr. Wilson have a conversation with you?

A Yes. Mrs. Silvers was very nervous and I tried to explain to Mrs. Silvers that she doesn't have to be nervous, just say what she knows, and Mr. Wilson told me not to interfere.

Q Not to interfere?

A Right. That's all.

Q Did Mr. Wilson talk to you?

A No.

Q He didn't say anything to you?

A No, that is all he told me that I shouldn't interfere.

Q He didn't say anything else to you?

A Nothing that I recall.

Q In that room?

A Right.

Q Did you and Mr. Silvers leave?

A Right. After that we left, yes.

Q Did she appear to be satisfied when she left?

A Yes. After Mr.Wilson showed the book and she read what was written in the book, then apparently she was satisfied, she left, because she told me, "Now I am satisfied that I came to straighten what I said was right."

Q Have you talked to Mr. Wilson in the last few days?

A I called him yesterday.

Q You spoke to him yesterday?

A Yes.

Q Did he talk to you about your testimony today?

A No, he didn't talk. I just told him that I got the subpoena from Mr. Hanrahan who came to the office and introduced himself as a doctor, and I was upset, and I talked to Mr. Wilson about that.

THE COURT: Who introduced himself to you as a doctor?

Q Mr. Hanrahan?

A Mr. Hanrahan.

THE COURT: Were you refusing to see him?

THE WITNESS: No, sir. My receptionist called me, I was attending a patient. He said he was a doctor. When I came upstairs, I said where was the doctor. There was no doctor. He gave me the subpoena. I said, "Where is the doctor?"

He said "This is the doctor."

I said, "Why did you say you were a doctor? I didn't say I wouldn't see you." I was very upset. I had an appointment today in Albany, sir, at 11:30, and

it was very short notice, and I told him, "You had two weeks' time" --

THE COURT: It is a citizen's duty.

THE WITNESS: One time, sir, is all right. But not all the time.

MR. ESBITT: No further questions.

CROSS-EXAMINATION

BY MR. WILSON:

Q Do you recall Mrs. Silvers being asked if she still wanted to see the Judge?

A When?

Q In the room after she looked at the book.

A No, sir.

Q You don't recall her being asked?

A Yes, I recall. The question that you put to me is that if Mrs. Silvers after you showed the book wanted to see the Judge?

Q Yes.

A The answer is no.

Q She did not?

A No.

Q Then she left she was happy?

A Yes, sir.

Q Did anyone threaten you or Mrs. Silvers?

A Nobody threatened.

Q At any time after that did she tell you that she wanted to change her testimony, after that day?

A No, sir.

Q Did anyone call her to your knowledge to try to make her change her testimony?

A Yes -- I don't know. She told me that she had been approached by Dr. Kavaler and Yvonne, that she -- they want a recommendation regarding Dr. Kavaler's character. So I said, "I know Dr. Kavaler only maybe four sessions or 12 sessions. I don't know his background, I cann't give such a recommendation."

Then the subject came back that they are planning to reopen the case, and they were not happy -- not "happy," I don't want to say anything that I don't know. The subject came out that some -- they were not happy what Gloria said at her first appearance in this court.

Q Did someone ask her to change her testimony?

A I don't know, sir. She didn't tell me that.

Q They were just upset with her about her testimony?

A What is the question?

Q They were upset with her?

A I was upset?

Q No, they were, about her testimony.

A I don't know the word "upset." I don't want to say anything I don't know.

Q What word would you use?

A That she has -- the correct word is that Dr. Kavaler was in 1971 or '72 was working there or no, and she said something that he was working here, and she made a mistake in saying yes he was working her or he was not working here.

Q That is what they told her?

A That is what they told her. She wanted badly to correct that.

Q Was that before you came down to the courthouse?

A No. This is recently, about a week or two weeks ago, maybe three weeks ago.

Q They convinced her that she had said something wrong?

MR. ESBITT: Objection to the characterization.

THE COURT: Sustained.

Q After she talked to Dr. Kavaler and Yvonne, she became upset again, if you know?

A No, she was not upset.

Q She was not upset?

A No, I wouldn't call her she was upset.

Q The day she left when she saw me and Mr. Hartwig, she was satisfied?

A She was satisfied, because she told me, "I feel happy now because I did came to the courthouse."

Q Did you see her read the book?

A Yes.

MR. WILSON: No further questions.

MR. ESBITT: No further questions.

THE COURT: Is there any reason why the doctor can't be excused at this time?

MR. WILSON: No, your Honor.

THE COURT: You are excused.

(Witness excused.)

THE COURT: Anything further?

MR. ESBITT: I want to call Mr. Wilson.

MR. WILSON: I would like an offer of proof.

THE COURT: I would take an offer of proof except I don't think there is any purpose served in taking an offer of proof in your presence, and I don't know whether Mr. Sorkin has enough familiarity to deal with an offer of proof in your absence.

MR. SORKIN: Your Honor, I first would like to note my appearance for the record.

THE COURT: Thank you for coming over. I did not know when I scheduled this hearing that there would be any desire to have Mr. Wilson testify.

MR. SORKIN: I think under the circumstances we would not have any objection to counsel calling Mr. Wilson, and I think Mr.Wilson and I both agree that an offer of proof would be proper at this time, outside of the presence of Mr. Wilson.

THE COURT: Mr. Wilson can step in the robing room, if he wishes.

(Pause.)

THE COURT: The purpose of an offer of proof is to save time. If everybody agrees that is what he will testify to, there is no use calling him.

What is the offer of proof?

MR. SORKIN: Your Honor, it was my understanding that Mr.Esbitt is calling him, not the Government.

THE COURT: What is your offer of proof? What do you expect to elicit from the witness you propose to call?

MR. ESBITT: I want to cross-examine him, which I have a right to do, about what happened on that

morning.

THE COURT: Is it your contention that Dr. Alizadeh and Mrs.Silvers have testified untruthfully?

MR. ESBITT: No, sir.

THE COURT: I don't see any need, unless you are attempting to impeach your own witness.

MR. ESBITT: I don't intend to impeach my witnesses, your Honor. I intend to cross-examine Mr. Wilson and find out exactly what happened.

THE COURT: You doubt the truth of the testimony of Silvers and Alizadeh?

MR. ESBITT: No, sir.

THE COURT: You proffered them to the Court. I know that the new rules of evidence say that --

MR. ESBITT: I am not challenging the testimony of these witnesses.

MR. SORKIN: The only purpose, then, would be to corroborate the testimony of his own witnesses, in which case the testimony in evidence would be cumulative.

THE COURT: I think so too, but, you know, the Court of Appeals might regard it differently, so let's get the whole thing out. He can cross-examine as to that incident.

MR. ESBITT: If your Honor please, I haven't had an opportunity to read Mr.Wilson's affidavit. I would like to read it before I cross-examine him. I have just received it a few minutes ago and the witnesses have been on the witness stand.

THE COURT: I will have a recess. I might say that I am limiting the testimony of the U. S. Attorney solely to that day and those incidents in the jury room. That is all. I didn't expect to take this long with it, and I really think you are only fishing, because you have given me two witnesses, and you say you believe they are truthful. There is no reason to think that Mr. Wilson would testify differently than the two witnesses the defendant gave the Court.

However, you may examine him as to the incident that day after she testified. I will have a ten-minute recess.

(Recess.)

THE COURT: Please take the stand, Mr. Wilson.

G E O R G E W I L S O N called as a witness by the defense, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. ESBITT:

Q Mr.Wilson, you saw Mrs. Gloria Silvers and

Dr. Alizadeh on the morning of Wednesday, July 28, I believe, is that right?

A Yes, sir.

Q What time of the day was it?

A It was late morning. We had just taken a five-minute recess after my closing summation in the case.

Q You had finished your summation?

A I had.

Q Or was it before your summation?

A It was after my summation. I recall the summation ran about an hour and a half, and the Court declared a recess prior to your summation.

Q You saw her in that witness room in back of the courtroom that you and I were trying the case in?

A Yes, sir.

Q In talking to her, she made it clear to you, did she not, that she wanted to change her testimony?

A No, sir, she did not.

Q What did she say to you?

A She said to me that she thought that she had answered questions wrong in that she had told someone she thought she mentioned in answer to the old man's question, as the term sticks in my mind --

Q By the "old man," she was referring to me?

A I assume.

Q I don't object to it.

A I don't consider myself an old man.

THE COURT: Everybody who is bald isn't old.

A (continuing) In any event, I assumed that she was speaking of your cross-examination, and the substance of her conversation was --

Q No, no, Mr.Wilson, excuse me. I don't want to know about the cross-examination. I want your testimony as to what she told you when you saw her that time during the break as to why she was here.

A As I started to say, the substance of what she said, I don't recall her exact words, but the substance of what she said was that in answer to questions she had testified that she had definitely seen Dr. Kavaler working during 1972 and 1973 at the Lee Avenue clinic.

Q Did she tell you in that conversation that she wanted to see the Judge?

A That is correct. Either she or Dr. Alizadeh, I forget which. I think it is probably Dr. Alizadeh that introduced the --

Q I am sorry, would you speak a little louder?

A I believe it was Dr. Alizadeh that said that

Mrs. Silvers wanted to see the Judge. It might have been Mr. Hartwig. In any event, I learned prior --

Q That she wanted to see the Judge?

A Prior to speaking to her that she had wanted to see the Judge.

Q Yes, you knew she wanted to see the Judge. Did you inquire from her as to why she wanted to see the Judge?

A I did, sir.

Q What did she tell you?

A What I previously related. In substance, that she felt that in answer to the old man's questions, that she had said falsely that she had definitely seen Dr. Kavaler during 1972 and 1973 at the Lee Avenue clinic.

Q And she said that was wrong?

A She said that was her -- her recollection was that was not true, that she had only seen him there, and that she did not see him working there.

Q Did you gather from that that she was trying to convey to you that when she testified she gave the impression that she had seen Dr. Kavaler working in '72 and '73 and that she was wrong about that?

MR. SORKIN: Objection to the form.

THE COURT: Overruled.

A Well, what I gathered was that she was upset about her answers to the very strikingly unequivocal questions asked her, "On your oath, are you absolutely sure that you saw him in 1972 and 1973," that stuck in my mind, and it is my impression at that time that she had come back thinking that she had told you that she had seen Dr. Kavaler working there in 1972 and 1973 when actually the transcript said, as we later found, that she had merely seen him there in '72 and '73. That is in answer to your question.

Q Did you read the testimony, Mr. Wilson?

A Read it out loud?

Q Did you read the testimony, since you prepared for this hearing?

A Yes, I have.

Q When she was testifying about Dr. Kavaler in '72 and '73, were your questions directed to her to find out whether she saw him or whether she saw him working there?

A Well, I wanted to establish that he was working there. I asked her, as I recollect, if she had seen him.

Q Yes.

A I believe the Judge interjected and said

something to the effect the question is, did you see him working there? She had asked for a clarification of the question.

MR. SORKIN: Your Honor, excuse me. Mr. Wilson is testifying from memory of what the transcript said. I think the transcript speaks for itself.

THE COURT: There is no need to read the transcript. I don't think the subjective intention of asking a question in clear English is relevant. The transcript speaks for itself. I don't care what he thought when he was framing the questions.

MR. ESBITT: Let me read the transcript in the record, if I may, Judge.

THE COURT: It is in evidence. It doesn't have to be read. I have to hear another matter.

Q Didn't Mrs. Silvers tell you that she was upset because she knew -- realized when she came to the courthouse to see the Judge that she had given the impression that she had seen Dr. Kavaler working in '72 and '73 and that was wrong?

A The impressiion that I got from her words -- I don't recall her exact words -- is that she felt that she had testified that she had seen him working in '72 and '73. Given the impression, I don't think I can state

with any certainty at this time what her exact words about what her impressions were or what other people's impressions were.

Q Because of that impression which you got as to why she came down to see the Judge, you showed her portions of the testimony in which the questions asked by me did not refer to working but referred to whether she saw him?

A That's correct, sir.

Q Is that true?

A Yes.

Q You showed her that and said, "You see, those were the questions that were asked you, you weren't asked about working"?

A That is correct. She read it.

Q She wasn't asked about working. But you knew from Judge Brieant's statement in the record when Judge interrupted -- I withdraw that comment -- when the Judge made the observation, quote from line 18 and 19 on page 1281, "The last time you saw him treating patients, is what the question was," so it was quite clear from the record, and what happened at the court, at the trial on this date, that both you and I were talking about Mrs. Gloria Silvers' recollection of whether she saw him

working and not just whether she saw him?

MR. SORKIN: Objection. Whatever the impression Mr. Wilson and Mr.Esbitt had is irrelevant to what she read and what she finally testified -- not testifie,d but what she told Mr. Wilson after reading it.

THE COURT: I will permit the question to be asked.

Q Answer the question.

A No.

Q "No", what?

A That's not true. Your question as posed is not an accurate statement of the facts.

Q Did Mrs.Silvers say to you that she felt she had made a mistake?

A Again, I don't know her exact words, but the substance of her conversation was that she felt she had made a mistake in her testimony.

Q Did she tell you that the mistake was that she had said "Maybe '72 and '73" and that she now recalls that he only worked four months in 1971 and not '72 and '73?

A No. My recollection, and this is rather distinct, is that she was under the impression that she had unequivocally told, testified, that she had

actually seen him in '72 and '73. The answers to my questions were equivocal, they were "maybe's," and could be's,"and the answers to your questions were unequivocal. The substance of her complaint to me was that she felt she had actually told a lie in saying she had actually seen Dr. Kavaler there in '72 and '73.

Q Did she tell you that she said she had told a lie?

A No, she said she felt. Again, in substance -- she was very, very upset. She was on the verge almost of being terrified of the idea that she might have lied under oath.

Q Did she say to you "All I came up here was to retract that and say that he wasn't working in '72 and '73"?

A Again, I can't answer her exact words.

Q Did you write a memorandum about this incident with Mrs. Silvers?

A The substance of her conversation was that she thought she had testified falsely and she wanted to get the record corrected, get it righted. Yes, I did make a memorandum of my --

Q May I see the memorandum, Mr.Wilson?

MR. SORKIN: Your Honor, if this is 3500

terial, I am not aware that 3500 material is required post-trial.

THE COURT: It is a hearing in the interest of justice, Mr. Sorkin. If you are not willing to give him the memorandum, submit it in camera and I will read it. It is not 3500 material, but it may be his recollection of the events.

MR. SORKIN: We have no objection, your Honor.

E WITNESS: It is probably in the folder.

MR. SORKIN: To expedite matters, may I just hand the folder to Mr. Wilson? He knows where it is.

(Pause.)

THE COURT: Mark it for identification.

(Defendant Exhibit B was marked for identification.)

Q Defendant's Exhibit B for identification, Mr. Wilson, when did you dictate it?

A I believe that I dictated it that very same day after I came back from court. Whatever the date is on the memorandum, it was typed the same day.

Q The date is July 29, 1976.

A It was either typed or dictated on July 29. My recollection is that I wrote it out in longhand on the

28th and it got typed up in due course.

Q Do you still have your longhand notes?

A No, I do not.

Q When you showed Mrs. Silvers the transcript, you just showed her my cross-examination of her, did you not?

A I am certain of that, and I am less certain how much of the rest of the transcript I showed her. I believe I showed her several pages toward the end of her testimony. I left the transcript with Mr. Hartwig when I had to go back to court, and I know that when I left the room it was there in front of her.

Q But you only showed her my cross-examination, is that true?

MR. SORKIN: That is not what he said. He said he may have showed her --

THE COURT: The record will show what the witness' testimony is.

Q YOu are certain that you showed her my cross-examination and you are not certain of having showed her anything else?

A I am fairly certain that I showed her the -- several pages in the transcript, because I had her read the transcript. I remember asking her if she was satisfied with that testimony.

Q In your memorandum, though, Defendant's Exhibit B for identification, you said "I showed her testimony on cross by Mr. Esbitt which only dealt with whether she had seen Kavaler during this period. Mrs. Silvers, after reading her testimony, appeared to be relieved that she had not testified falsely."

MR. SORKIN: If he is reading from it, we have no objection to it going in evidence.

MR. ESBITT: I offer it in evidence.

THE COURT: All right.

xxx (Defendant's Exhibit B was received in evidence.)

Q There is nothing in that memorandum that you dictated, Mr. Wilson, that you had shown her anything other than my cross-examination.

A Whatever the memorandum says, it speaks for itself.

Q There is nothing in my cross-examination of Mrs. Silvers that referred to working, is that not true?

A The only distinguishing feature about your cross-examination, and this made a vivid impression on me, is that you, when you asked the question, in very dramatic voice, typically dramatic cross-examination, she answered with equal drama "Yes," and I recall thinking

at the time, "Oh, oh, he stepped into it, she really did it," because I had broken off the line of questioning because I was upset with her equivocation, and I felt that I couldn't get it out of her, and I was quite surprised when you came back on direct, ver, very definitely and dramatically, and she with equal drama and definiteness, I guess, came back at you, "Yes, yes, yes, I saw him."

THE COURT: Mr. Wilson, were you of the opinion when Mrs. Silvers was testifying on the trial that Dr. Kavaler had in fact treated patients at the Lee Avenue clinic during 1972 and 1973?

THE WITNESS: I was of the opinion based on both her testimony, Dr. Alizadeh's testimony and what was in the records, that that would be a reasonable inference to draw.

THE COURT: What were you basing your inference on?

THE WITNESS: I was basing it on the -- both the testimony of Mrs. Silvers and Dr.Alizadeh and also the entries which were in the records. The entries show some 13 rent payments, I think only three or four of which were annotated as being for Dr. Winston, I think two or three for Dr. Winston and one for Dr. Newfield, and all the rest had no annotation. I drew the inference

from that that they were rent payments for his own business. On the four corners of that evidence, I drew that inference and I argued it to the jury. Had I only had Mrs. Silvers' testimony to go on, however, I don't think it would have been fair drawing that inference.

THE COURT: YOu really though- that this distinguished trial lawyer was engaged in shaking the tree?

MR. ESBITT: I am sorry, Judge, I can't hear you.

THE COURT: Do you really think he was shaking the tree when he asked those questions?

THE WITNESS: I think in retrospect that he is sorry he asked the question, based on her answer, because it ma'e an impression on me that he had really gotten out of her what I couldn't get out of her. At least sheis definite she had seen him during those two years.

THE COURT: She had seen him. Let's go forward.

BY MR. ESBITT:

Q You used her testimony and Dr. Alizadeh's testimony and the records in your summation, did you not? I have a portion of your summation in the record --

MR. SORKIN: Your Honor, if it speaks for itself, I would like to expedite this matter too.

THE COURT: I would like to expedite it too, Mr. Sorkin.

MR. ESBITT: I won't be very long, Judge.

Q You used that?

A I used the entire transcript and all the exhibits in my summation.

Q With respect to this part of it, you used her testimony as part of your summation, did you not?

THE COURT: The summation speaks for itself. I am prepared to find he used everything he could use.

Q These two pages which constitute pages 1283 and 1282 -- no, just page 1283, which is my cross-examination of Mrs. Silvers, did not contain the remark of the Judge in which he said, "The last time you saw him treating patients, was what the question was"?

A Whatever the record says. That speaks for itself.

Q You didn't show her that page 1281, or at least you didn't put it in your memorandum?

A I am fairly certain I did. At the time I wrote the memorandum, the thing that I had focused on was I recall distinctly she was complaining about her answers

to the old man's questions, and I recall also having a vivid impression in my mind that I guess she had kind of torpedoed you on the cross-examination, you withdrew from cross as quick as I did from direct on the subject, and that was what I focused on both when I talked to her and when I wrote the memo.

But I do recall leafing through pages, and I did leave the transcript with her. I am fairly certain that she reviewed her testimony both direct and cross.

Q Did you leave that agent of yours in the room with her?

A I did, sir.

Q After you left?

A I did, sir, along with the transcript.

Q Do you know, did he report to you that she had read other portions of the transcript?

A I don't recall exactly what he reported to me. I think he said that she had left the transcript, asked her if she had any more problems with it, talked to her and I think probably she did look at the transcript. I wasn't there. I don't know what she did. I don't recall specifically what he reported --

Q You didn't put that in your memorandum.

MR. SORKIN: Your Honor, we stipulate it is

not in the memorandum.

THE COURT: It is in evidence.

Let's go forward.

Q You had an opportunity to examine that diary, the 1971 diary that you referred to in summation. Have you had an opportunity to establish whether or not it was a recent fabrication?

A Mr.Esbitt, there is no scientific way to establish that type of thing. You know that as well as I.

THE COURT: This goes beyond the offer of proof and it is being asked without reference to a time frame. I assume he has done nothing with this case since the verdict came in.

Q One other question, Mr. Wilson. You had all the invoices filed by Dr. Kavaler during his Medicaid period,did you not? Do you have them in your office or have you had them?

A That's correct.

Q Did you find a since Medicaid invoice signed by Dr. Kavaler or submitted by Dr. Kavaler for 1972 or 1973?

MR. SORKIN: Objection as to what relevance this has to Mrs. Silvers' testimony.

THE COURT: I will take it.

A Did I find any invoices submitted by Dr. Kavaler for '72 and '73?

Q For Lee Avenue, for Dr. Alizadeh's office.

A I think not.

Q After you showed her my cross-examination and you said to her, "Well, you don't see anything wrong," and she agreed with you -- is that true?

A I think when I asked her "YOu don't see anything wrong," it was at the end of the conversation. I might have asked her a couple of times. It is true, I guess, to the extent that you asked the question, yes.

Q Did she not say "I don't see the question in that book, was he working in '72 and '73, but I felt that is the impression I might have given the jury. In fact, I am almost positive. That is what is bothering me."

A I think she told that in response to Mr. Hanrahan on that tape recording, and I have no idea of how that interview was conducted.

THE COURT: Just answer counsel's question.

Q I asked you whether or not she said that to you at that time when you were talking to her in the witness room.

A Would you repeat that question?

Q Yes. Did she not say to you at that time, "I don't see the question in that book, was he working in '72 and '73. But I felt that is the impression I might have given the jury. In fact, I was almost positive. That is what was bothering me."

A She didn't complain to me that she didn't see the question in the book that was bothering her. Had that been the case, I would have sat her down and made her read the entire transcript. No, she did not. She told me that she felt that she had said in rather definite terms that she did in fact see him working there in '72 and '73, and after looking at the transcript, she was visibly relieved, I recall joking about it and telling her, "You feel better now, do you still want to see the Judge?"

"No, everything is okay," and then I had to go back to court.

MR. ESBITT: I have no further questions.

THE COURT: Is there any cross-examination?

MR. SORKIN: No, your Honor.

THE WITNESS: Your Honor, could I consult with counsel?

THE COURT: Please, Mr.Wilson.

THE WITNESS: I think it is important for the record.

MR. ESBITT: I didn't hear these comments.

THE COURT: He said he wants to consult with counsel.

MR. ESBITT: Sure.

(Pause.)

MR. SORKIN: May we ask just one question, your Honor?

THE COURT: All right.

CROSS-EXAMINATION

BY MR. SORKIN:

Q Mr. Esbitt asked you if you noticed any invoices I believe for the years 1972 and 1973. Do you recall that line of questioning?

A For Lee Avenue, yes, sir.

Q You have done a number of Medicaid fraud investigations, is that correct, Mr. Wilson?

A That's correct.

Q Based on your experience in these investigations, is there any significance to not finding invoices for a period of time relative to a particular address?

A No.

Q Tell us why, please.

A Because quite often when people are associated with different clinics, they either buy or borrow patient

names from other clinics to increase their billings, and then they go back and bill from their own address, and what Mrs. Silvers talked about, going over and borrowing invoices, quite often doctors will go from one clinic to another and borrow the pinks, which is the file copy showing all the data in which one might write a new invoice, get paid and write it from their own address.

There is no requirement that the invoice bear the address where the patient is actually treated. So Dr. Kavaler could either have even,or used patient records from Lee Avenue for one thousand patients, but as far as the invoices that go to the city, every one of them could have been treated in 950 Flushing Avenue.

THE COURT: Is it reasonable to suppose that a provider would actually render service from Lee AVenue and bill it from Flushing Avenue? I am talking about legitimate services, people actually seen.

THE WITNESS: No, your Honor. It is more reasonable in light of the extent of this type of fraud and this particular conspiracy that a person would go to another clinic and obtain the names and Medicaid numbers of patients treated at that clinic and go back and bill from their own clinic.

THE COURT: That is not what the line of

inquiry was about. They were talking about seeing patients legitimately, actually servicing them.

THE WITNESS: This is in response to Mr. Esbitt's query as to whether we had invoices from Lee Avenue. It had no significance to me.

MR. SORKIN: That is all.

REDIRECT EXAMINATION

BY MR. ESBITT:

Q As a matter of fact, you never found a single invoice from Lee Avenue for Dr. Kavaler from 1972 and 1973, with all your investigations?

A We only have, I guess, 75 per cent of the invoices from the city because a lot of them we just couldn't locate, so I cannot say with any certitude that there was never in fact an invoice during '72 and '73 from Lee Avenue.

Q But you can say in fact that your investigations didn't disclose a single one for '72 and '73?

THE COURT: He already told us that.

MR. ESBITT: No further questions.

MR. SORKIN: No further questions.

THE COURT: Step down, Mr. Wilson.

(Witness excused.)

THE COURT: I am going to have to continue

this hearing, Mr.Esbitt, in order to attend to another matter which I have.

Would you come back at 1:30?

MR. ESBITT: Whenever your Honor directs me to come back.

MR. SORKIN: May I anticipate of Mr. Esbitt if he anticipates calling Mr.Wilson again?

MR. ESBITT: Yes, Judge.

THE COURT: I guess you are excused from the case, Mr. Sorkin.

Thank you for coming over on short notice.

What about these other witnesses? What else do you have?

MR. ESBITT: That is all I have.

THE COURT: Come back at 1:30.

MR. ESBITT: May I ask a question, your Honor?

THE COURT: May the witnesses be excused that are waiting out there?

MR. WILSON: The ones who have testified. I don't know what Mr. Esbitt's plans are.

THE COURT: He just rested.

You rested?

MR. ESBITT: Yes, sir.

MR. WILSON: He has no further evidence to

offer?

THE COURT: Do you have any?

MR. WILSON: I think not. Mr. Hartwig is available, if Mr. Esbitt desires to call him.

THE COURT: I will direct the clerk to excuse the people in the witness room. I still want you to come back at 1:30.

MR. ESBITT: May I ask a question, your Honor?

THE COURT: Yes.

MR. ESBITT: I wonder if I may have the record transcribed so that I may argue this motion on the basis of the record itself.

THE COURT: These proceedings are continued for all purposes until Thursday, September 23, at 4:00 P.M., and Dr. Kavaler is continued on his existing bail arrangements to be here at that time. The taking of proof is closed at this time, as I understand it. You have nothing further in the way of proof, either of you?

MR. ESBITT: No, sir.

MR. WILSON: Nothing, your Honor.

THE COURT: The clerk may tell the witnesses in the witness room that they are now excused. I will see you all on Thursday.

(Adjourned to Thursday, September 23, 1976, at 4:00 P.M.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Gloria Silvers	11	26	41	42
Hamid Alizadeh	49	59		
George Wilson	65	84		

EXHIBIT INDEX

Defendant	Identification	In Evidence
A		12
B	74	76

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Laurence A. Pennypacker

Official Court Reporter
U. S. District Court

gw:mg A 405

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

v. : 76 Cr. 241

MAX KAVALER, :

Defendant. :

- - - - - - - - - - - - - - - - - - -x

B e f o r e:

HON. CHARLES L. BRIEANT,
District Judge

New York, New York
September 23, 1976
4:30 p.m.

APPEARANCES:

ROBERT B. FISKE, JR.,
United States Attorney
Southern District of New York
GEORGE E. WILSON,
Assistant United States Attorney

WILLIAM ESBITT, Esq.,
Attorney for Defendant

gw:mg

(Case called)

MR. WILSON: Ready.

MR. ESBITT: Ready.

THE COURT: Mr. Esbitt, you may proceed.

MR. ESBITT: May I address the Court with respect to the motion, your Honor?

THE COURT: Yes.

MR. ESBITT: If your Honor please, this is an application under the appropriate rule of the Rules of Criminal Procedure for a new trial on the ground of newly discovered evidence.

A hearing has been held before your Honor. We have the transcript of the testimony to which I shall refer.

Your Honor, I think the record is clear that this witness had testified on the witness stand on the last day of the trial as a rebuttal witness for the government to establish for the benefit of the government that Dr. Max Kavaler had testified falsely when he had testified under oath on direct and cross-examination that he had never, never worked in the Lee Avenue Clinic in 1972 and 1973.

The government witness, in rebuttal, the one whose testimony we are concerned with, was Mrs. Gloria

Silva, and she testified on direct examination by Mr. Wilson that she had seen the defendant in 1972 and 1973.

The question asked by Mr. Wilson was, and I quote from page 1281 of the record:

"Q When do you recall was the last year you saw him?

"A The last time I saw him?

"Q Yes."

And then your Honor posed the question properly. Your Honor said:

"The Court: The last time you saw him treating patients is what the question was.

"A I'm not too sure, '73, '72.

"Q '72 or '73?

"A Yes."

Question by Mr. Wilson:

"Q The last payment you saw was January of '74, do you remember him treating patients then?

"A Could be."

That concluded Mr. Wilson's direct examination.

Then on cross I picked up her last answer and said, and I quote from 1283 of the record:

"Q You said, 'Could be'; are you positive under oath that you saw him in 1973?

"A Yes, I did.

"Q And in '72?

"A '72, possibly.

"Q And '71?

"A '71, I did."

Your Honor, I think the record is clear that a very short time after this witness had testified -- which concluded the case, by the way -- and on the trip back to her clinic with Dr. Alizadeh, she informed Dr. Alizadeh that she thought her testimony was in error, and that appears in the record.

I will only make reference to the record where I think it is material to read portions of it. She was disturbed by that, and the following morning at seven o'clock in the morning she called her lawyer, a Mr. Joe Perrini, and said that she thought that she had given the wrong impression to the judge and jury and what should she do about it.

And he told her, and here I am going to read from the record, she said, from page 13 of our new record, "I said I think I made a mistake as far as the years were concerned, which is '72 and '73."

I now drop to the bottom of page 14, which is actually her conversation with Joe Perrini in which she

said, "I told Joe that I was very upset, that I think I made a mistake on the way I answered the question, and that I would like to retract it or fix it, was there any other way -- any way to do that. I wasn't sure how you go about doing that or if you could do that."

Question by myself:

"Q What did Mr. Perrini, your lawyer, say to you?

"A He said if I felt that I made a mistake and I am telling the truth, I should come back to court early in the morning, if possible, and see the Judge, whoever was the Judge at that time.

"Q Did you do that?

"A Yes, I came back here."

She did come back the next day and she came back with her employer, Dr. Alizadeh.

I want your Honor to know that this conduct and action on her part was entirely unsolicited by the defendant. In fact, we knew nothing about it until many weeks after the jury had reached a verdict, and it was only by happenstance that we happened to find out that she had come back the next day.

Now, after having spoken to the lawyer that same morning, she and Dr. Alizadeh came back apparently to reach the courthouse but ended up in the U. S. Attorney's

Office in the next building, and there she by happenstance also met Agent Hartwig, and the record is also clear as to what she said to him.

That appears on page 17 of the record, on line 9 and line 10 and line 11.

She said:

"I told him I made a mistake when it came to the length of time that the doctor was working, the years, rather."

And then Mr. Hartwig informed Mr. Wilson, who had apparently at that time just completed his opening summation and brought it to his attention.

And let me make this clear. Mr. Wilson knew that morning from Mr. Hartwig and knew that morning from Mrs. Silva why she was here to see the Judge, not to see me, and not to see Mr. Wilson, but to see the Judge. And the record on that is equally clear, and I read now from page 18 of the record as to what she said to Mr. Wilson.

"Q What was said?

"A Well, I told him I wanted to change what I had said, that I felt I made a mistake, that Dr. Kavaler did not work in '72 or '73, some other doctor was working at that time.

"Q You said that to Mr. Wilson?

"A Yes.

"Q What did Mr. Wilson say?

"A He said, 'We never asked you that question.'"

Now, this of course is contrary to the facts because the record is equally clear that Mr. Wilson did ask the question, and I have quoted a portion of it, but I must requote it from the bottom of page 1281, after your Honor said to the witness:

"The last time you saw him treating patients is what the question was."

And then the last question by Mr. Wilson was:

"The last payment you saw was January of '74, do you remember him treating patients then?

"A Could be."

So when Mr. Wilson said to her, "We didn't ask you that question," that was contrary to the facts. The facts are that both your Honor and Mr. Wilson were talking about treating patients and when I asked her, had she seen him, I by inference was saying, "Had you seen him treating patients?"

Now, what was the next thing that Mr. Wilson did in connection with speaking to this woman? And, by the way, I might say that Mr. Wilson's affidavit confirms

that Mrs.Silva felt that she had told the Court that she saw Kavaler working in '72 and '73, and I refer your Honor to Mr. Wilson's affidavit submitted in opposition.

On page 4 in paragraph 5, let's see what Mr. Wilson has told the Court. This is after the investigator had advised Mr. Wilson that he had run into Dr. Alizadeh and Mrs. Silva.

"Mrs. Silva thought she had testified falsely in answer to the old man's question" -- and I am the old man --"by saying that she saw Kavaler work at the Lee Avenue Clinic in 1972."

So Mr. Wilson was told that by Mrs. Silva about working.

And then I would go on with Mr. Wilson's affidavit.

"I showed her her testimony on cross by Mr. Esbitt."

The significance of that, your Honor, is apparent when one looks at my cross-examination, which I will come to in a minute. And Mr. Wilson goes on:

"She had apparently felt she had uneqivocally responded that she saw Kavaler working at Lee Avenue in 1972 and 1973 when in actuality she had merely said that she had seen him during that period."

That is contrary to the facts because Mr. Wilson himself asked her whether she saw Dr. Kavaler working in '72 and '73.

I go on with that affidavit of Mr. Wilson.

"After reading her testimony, Mrs. Silva appared to be relieved that she had not testified falsely and it was then apparent to her that she had been mistaken in her recollection of Mr. Esbitt's question."

But she was not mistaken, your Honor, as to the questions asked by your Honor or by Mr. Wilson, because she had testified that she had seen him working, and when she got back to her office, she realized she had made a mistake, and I will continue with Mr. Wilson's affidavit.

"Having satisfied myself" -- this is Mr. Wilson speaking -- "having satisfied myself that Mrs. Silva's present recollection was not at odds with her testimony, I asked her if she still wanted to talk to the Judge."

First of all, I raise a question as to what right Mr. Wilson has to satisfy himself when the witness came here to see the Judge, and when he satisfied himself, he satisfied himself in error unless that is what he wanted to do, because she had testified on direct examination, in answer to Mr. Wilson's questions, that

Dr. Kavaler had been working in 1972 and 1973.

And I think the record is equally clear that the only thing that Mr. Wilson showed to Mrs. Silva was not her testimony in answer to Mr. Wilson's question, and not her testimony in answer to your Honor's question, but only her testimony with respect to my cross-examination.

So he showed her only page 1283 of the record and a few questions asked by myself, and true, I did not say "Were you working" because the inference was clear from the prior question, but having shown her only my cross-examination onone page, page 1283, and when she saw that,she was easily persuaded by Mr. Wilson that there was nothing in there about working, only about whether she saw him.

This statement that I make to the Court that all Mr. Wilson showed her was the cross-examination is confirmed by Exhibit B, which is Mr. Wilson's statement or memorandum made by him that afternoon or the following day, which is now Exhibit B before your Honor, and which I quote from:

"I showed her" -- Mr. Wilson speaking -- "her testimony on cross by Mr. Esbitt which only dealt with whether she had seen Kavaler during that period. Mrs. Silva, after reading her testimony, appeared to be relieved

that she had not testified falsely and apparently that she was mistaken in her recollection of the questioning by Mr. Esbitt."

But she was not mistaken in her recollection that she had testified in this courtroom before your Honor that she had seen him working in 1972 and 1973.

And that was the problem that was bothering her all day and all night.

Besides Mr. Wilson's memorandum, I refer your Honor to the affidavit of Mr. Hartwig submitted by the government agent, in which in paragraph 4 of an affidavit signed by Mr. Hartwig, it is quoted as follows:

"Mr. Wilson showed her Mr. Esbitt's cross-examination in the transcript. She read it and it was pointed out to her by Mr. Wilson that she had merely told Mr. Esbitt she had seen Dr. Kavaler during '72 and '73."

She was persuaded she had nothing to tell the Judge about. That is exactly what happened, your Honor.

Your Honor seemed to have some doubts during the course of Mrs. Silva's testimony as to whether Mrs. Silva had repeatedly said that she had testified that she saw Dr. Kavaler in '72 and '73, and I should like to refer to additional portions of her testimony. But I want to emphasize this.

Not only did Mrs. Silva testify on this hearing that she was wrong when she said that Dr. Kavaler had worked in '72 and '73, she also said the records did not reflect what she testified to on the original examination.

I refer your Honor to pages 20 and 21 of the record in which I asked her:

"Q Did you say anything to him" -- meaning Mr. Wilson -- "about the records?

"A Oh, the papers which they took from me, those papers?

"Q Yes.

"A Yes. I told him that if they look back in those papers they might see Winston's name in parentheses in red ink. I had written a name down here, but I wasn't sure what it was, whose name it was, until I remembered Dr.Winston was probably working at that time, and that's why I was receiving payments for him. It is written there."

So she had not only told Mr. Wilson that her testimony was in error when she said that he was working in '72 and '73, her testimony was equally in error when she was testifying with respect to checks received from Dr. Kavaler.

Now I refer your Honor to further portions of

the record which I think are material. This is on cross-examination by Mr. Wilson at page 32 of this record.

Questionby Mr. Wilson:

"Q But if you wanted to see the Judge, you wouldn't have left, is that correct?

"A Well, when I came back and I saw in the book it wasn't the way- the question wasn't put the way I thought it was, though someone had asked me that question some time, otherwise it wouldn't have been in my mind."

This is after she had been shown by Mr. Wilson only my cross-examination. This is her testimony on cross-examination by Mr. Wilson, I repeat. I continue.

"A Someone did ask me did he work in '72 and '73, and I said 'I think yes,' which was wrong. That's all I came up ..." -

And that's why she came here.

On page 39 of the record:

"Q Did you tell him" -- this is cross-examination by Mr. Wilson, referring to whether she had a conversation with Mr. Hanrahan or Dr. Kavaler -- ""Did you tell him that you testified incorrectly or inaccurately?

"A Yes, that I felt I did. Someone asked me a question, did he work in '72 and '73 -- I don't remember who it was -- and I might have answered wrong. That's all

I said.

"Q You might have answered wrong?

"A That he was working '72 and '73, I think that was the answer that I had given."

And then at page 41 of the record:

"A I kept repeating myself, the reason why I came up was I felt I made a mistake saying that Dr. Kavaler worked '72 and '73, which he didn't. Later on I realized he didn't. Dr. Winston did, and that was it."

And now if I may read a short portion from Mr. Wilson's testimony.

On my questioning of Mr. Wilson, when I asked Mr. Wilson what Mrs. Silva had said to him in that witness room, he answered: "... the substance of what she said was" --

MR. WILSON: Where are you?

MR. ESBITT: I am sorry. Page 67.

"...but the substance of what she said was that in answer toquestions she had testified that she had definitely seen Dr. Kavaler working during 1972 and 1973 at the Lee Avenue Clinic.

"Q Did she tell you that in that conversation that she wanted to see the Judge?

"A That is correct."

Now, your Honor --

THE COURT: You ought to read the rest of the answer there on page 67.

MR. ESBITT: I will continue with the answer.

"A ...Either she or Dr. Alizadeh, I forget which. I think it is probably Dr. Alizadeh that introduced the --

"Q I am sorry, will you speak a little louder?

"A I believe it was Dr. Alizadeh that said that it was Mrs. Silvers wanted to see the Judge. It might have been Mr. Hartwig. In any event, I learned prior --

"Q That she wanted to see the Judge?

"A -- prior to speaking to her that she had wanted to see the Judge."

THE COURT: All right.

MR. ESBITT: I need hardly remind your Honor that in Mr. Wilson's summation he laid great emphasis on this portion of the government's rebuttal. Your Honor will recall that one of the documents presented by the defense was Defendant's Exhibit AC.

THE COURT: Would you hand that to the Clerk, please, Mr. Esbitt?

MR. ESBITT: Yes, sir. (Handing).

That was a significant document offered by the defense to establish that Dr. Kavaler worked at the Lee

Avenue Clinic during a period of approximately four months in 1971.

In that diary he had kept a record of every patient that he treated in the Lee Avenue Clinic.

Mr. Wilson, of course, was anxious to destroy Dr. Kavaler's testimony and used Dr. Alizadeh and Mrs. Silva on the record to attempt to establish that Dr. Kavaler was in fact working in the clinic, and he so made reference in his summation and laid a great deal of stress on it.

I quote from portions of Mr. Wilson's summation appearing on page 1341 of the record.

Going back to the beginning of that page, Mr. Wilson told the jury:

"You will have the book for Lee Avenue, Defendant's Exhibit AC, which was apparently lost from the first conspiracy" -- and that is the book your Honor has in front of him.

Later on Mr. Wilson said:

"Dr. Kavaler testified when he was asked why this was so short that, well, he didn't work at Lee Avenue after May of 1971."

He went on to say:

"You heard the testimony of Dr. Alizadeh and

his secretary, Mrs. Silva, they were receiving rent payments from him as late as January, 1974, and it was their best recollection that he worked there as late as December 1973." And so on.

Mr. Wilson, of course, laid great emphasis on this. The purpose, of course, of these witnesses and the purpose of the summation was to destroy the credibility of the defendant Max Kavaler.

Your Honor, when this witness, who had, sua sponte, on her own initiative, recognized that she had made a mistake and an error in her testimony and called her own lawyer and was advised to see the Judge and came down to this courthouse for that purpose, I submit to your Honor, and being as charitable as I can to Mr. Wilson, an Assistant United States Attorney, I submit that he had no right; yea, I say to your Honor that he had not only an obligation but he had a duty to bring this immediately to the attention of the Court, and I might remind your Honor that Mr. Wilson at that very point was in the witness room with Mrs. Silva and Dr. Alizadeh and Mr. Hartwig and that witness room was not more than ten paces away from where your Honor was in his robing room, and no more than ten or fifteen paces away from where I was in the courtroom. So he had not very far to go.

So I think it is very clear that he was endeavoring to persuade this witness, on the basis of impressing upon her only with respect to my cross-examination, that that testimony was not in error and what did she have to see the Judge for?

He had a duty, I submit, to bring this witness to your Honor and let your Honor decide whether your Honor wanted to reopen the trial or not.

While one cannot predict what would have happened at the trial and while I recognize that this is not the only bit of evidence that could have been considered by the jury, I submit that this is more than impeaching evidence, this is not impeaching evidence at all; this is a retraction, a retraction by a key witness made before this case was submitted to the jury.

THE COURT: Doesn't the expression "retraction" imply the witness testified falsely?

MR. ESBITT: No, sir. She had not testified falsely. That would suggest she knew she was testifying falsely.

After she left the courtroom -- she left and realized, because of the confusion -- there was confusion, your Honor. There was confusion because some of the questions directed to her said "working."

Your Honor brought that to her attention, Mr. Wilson did. And I did not.

In any event, of course it did not suggest that she was testifying falsely at all. She recognized that she had given the wrong impression to the jury and she recognized-- but even if it was false, let's assume that it was a false statement, and now she is correcting a false statement. That retraction which would have the effect of changing her testimony is one that your Honor had the right to decide and not Mr. Wilson, and I don't think he had the right to conceal these facts from the Court and from defense counsel and whether one used the Brady v. Maryland theory or common decency, he had that obligation.

I might refer your Honor to a recent case decided by our Court of Appeals in a per curiam decision. The case is United States v. Fried. The citation is 486 F.2d 21, decided 1973, a per curiam opinion by Judge Kaufman, who has been an Assistant United States Attorney, Judge Moore, who has also been an Assistant United States Attorney, and former United States Attorney for the Eastern District, and Judge Mansfield, and in that case, which is not as strong a case as this, a witness had testified against the defendant and the government omitted to disclose to

defense counsel an indictment against the witness.

THE COURT: That is a different case, I think.

MR. ESBITT: Yes, sir.

This is a stronger case because that case merely reflected upon the credibility of that witness.

This testimony, this retraction, would have a profound impact upon the jury's consideration of Dr. Kavaler's guilt or innocence.

In that case, the Court of Appeals said, and I quote: "Such negligence," referring to the negligence of the Assistant United States Attorney, "hardly adds lustre to an important government officer whose aim should be to achieve justice rather than to obtain a conviction."

Mr. Wilson had a duty to disclose this to the Court and not conceal it.

It was by mere happenstance we know about that today. Otherwise no one would have known about it, not your Honor and no one. He had that duty and he failed to discharge that duty, and I submit that under all the authorities such as Brady v. Maryland, as well as common decency, there should be a new trial.

THE COURT: Thank you.

Would you like to be heard?

MR. WILSON: I would like to respond briefly.

your Honor.

I don't need to remind the Court that Mr. Esbitt's long and eloquent presentation is not evidence.

One of the things Mr. Esbitt has glossed over is this happened after the government's closing argument. He was surprised and I think the record does not reflect it but you can tell from the tone of his voice when he asked me the second time on my direct examination was it after my summation.

I don't think he knew that. There was nothing gone into this on rebuttal.

What he appears to be complaining about is two answers given by Mrs. Silva out of -- I forget-- a 1400 or 1600-page record.

On one or two pages she said she had seen him around the clinic, and I don't think anyone will dispute that. That is virtually conceded.

And then the two answers she gave which Mr. Esbitt claims as a ground for a new trial because of common decency, apparently this is Brady material or new evidence which is so astounding, so devastating that Dr. Kavaler deserves a new trial.

Here are the answers:

"I'm not too sure, '71, '72." "Could be."

That's anything but unequivocal. It was testified at the hearing that was enough to deter the prosecutor from any further questioning because it was obvious that Mrs. Silva was not going to put Max Kavaler working at the clinic during that period.

Mr. Esbitt, as suggested by the Court, did shake the tree on recross-examination and got hit in the head with a grapefruit, and I recall -- it is in the testimony of the hearing -- that in very dramatic tones he thundered forth, "You said 'could be.' Are you positive under oath?"

I recall that distinctly. It was a very dramatic moment.

She shot back, "Yes, I did."

I pictured to myself, jokingly, the sound of broken glass.

Defense counsel asked the question on cross-examination.

THE COURT: I think it ought to be observed the argument cuts both ways. It was clear he had some connection with the Lee Avenue Clinic. His name was on their books. So if he never went there at all, that didn't help the conspiracy count any.

MR. WILSON: It certainly did not, your Honor.

Mrs. Silva's call was an afterthought. She was asked if she had seen Dr. Kavaler working at the clinic. The testimony wasn't sufficient to base the whole argument on. It wasn't that important.

With that in mind, the unequivocal answer that she shot back to Mr. Esbitt, it was clear when she came in and her testimony at this hearing is what controls and not what is on the tape at a one-hour meeting surrounded by Dr. Kavaler and all of his cohorts suggesting and cajoling and leading her, but what she testified on the stand, that is what matters, and it was clear from the testimony that she was worried she had actually put him in the clinic at that time.

The pages Mr. Esbitt did not read and I am not going to read many, they are not full pages, on page 30, about halfway down- - well, let me start at the bottom of 29:

"Q (By myself) And you recall examining the transcript in answer to my questions, you recall you testified for several minutes about records, and we took papers and put them in evidence, and then you were asked a few questions, 'Do you know Dr. Kavaler?' 'Had you seen him at the clinic?' "And do you recall at that time saying that you were not sure if he worked there in '72 or

'73 or he worked there in '72, and '73 you were not sure, do you recall that?

"A Yes.

"Q At the time you testified you were actually sure if he worked there in '72 or '73?"

I think that is probably a typo. It should be "not sure."

The answer was:

"A No, I wasn't sure.

"Q So you were not lying then, were you?

"A No. I couldn't remember that far back, really.

"Q Then were you asked another question, his last payment was in '74, could he have worked in '73, and you replied 'could be,' or 'could have,' do you remember that?

"A Right.

"Q That wasn't a lie, was it?

"A I didn't feel I was lying at the time.

"Q That was your recollection?

"A Yes.

"Q That was your honest recollection under oath at that time, is that right?

"A Right.

"Q After, later on, you thought, 'Well, I was

wrong in saying that he might have, and he really didn't'?

"A Right.

"Q After reading that transcript, did you feel that you had lied in any respect or were inaccurate?

"A Not when I read the book you gave me."

Going on to page 42.

"Recross-Examination

"By Mr. Wilson:

"Q When you testified you testified truthfully and to the best of your recollection?

"A Yes, I did."

Then going on to page 59, Dr. Alizadeh's cross-examination. Mrs. Silva could not remember anything about being asked if she still wanted to see the Judge except if she wanted to see the Judge, she would not have left.

"Q Do you recall Mrs. Silvers being asked if she still wanted to see the Judge?

"A When?

"Q In the room after she looked at the book.

"A No, sir.

"Q You don't recall her being asked?

"A Yes, I recall. The question that you put to me is that if Mrs. Silvers after you showed the book

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wanted to see the Judge?

"Q Yes.

"A The answer is no.

"Q She did not?

"A No.

"Q When she left, she was happy?

"A Yes, sir."

Now, it is clear that even if Mrs. Silva had not looked at her entire testimony that she testified unequivocally in answer to my cross-examination that she felt she had not lied when she said, "I am not sure, could be," and that was not what was bothering her.

She testified at two different places she was telling the truth and testifying to the best of her recollection. That's it. That should be as far as it goes.

All the other circumstances Mr. Esbitt relies on is embellishment. Mr. Esbitt seems in tone to be outraged, that the government has no right to consult its witnesses and make a determination whether or not his witnesses have done something improper. That determination is made by one of the government witnesses, by the proponent of that witness. That witness was asked if she still wanted to see the judge and she declined, and the

record is clear on that.

Now, Mr. Esbitt wants to parlay existing cases into some kind of a privilege, an absolute privilege, that a witness, being unsophisticated, not knowing who to go to, once she utters a thought or utters the words, must then see a judge.

I can see that this would result in every case being retried because all one would have to do if he was convicted is some time before he is sentenced, go back and reinterview all the government's witnesses and have them all troop back in and tell the judge they testified falsely and we wouldhave another trial.

We could keep on doing that ad infinitum until an acquittal or until the government gave up.

I don't think there is any interpretation of law that I know of that allows this set of facts to be raised to the dignity of evidence which would demand a new trial.

In our affidavit we set forth the basis for a new trial. Mr. Esbitt, after shaking the tree and having been hit on the head by the proverbial grapefuit, dropped it. He could have pinned her down and asked whether she had seen him working. He didn't. That could have been discovered before the end of the trial, and he

didn't. So it fails right there.

On the other count it fails, too. This is cumulative evidence, it is collateral. Moreover, it is clear on this record that even if a new trial were granted, another jury could not possibly, on the basis of that change, that small change, reach a different verdict.

On all three standards for a new trial, this flimsy evidence does not pass the test.

There is no question here that this is not Brady material because the witness has been rather unequivocal in saying she has not lied, she testified to the best of her knowledge. I think on that basis and on the basis of any other theory Mr. Esbitt may propound, it fails to satisfy the new trial requirements.

I think that this motion should be denied.

MR. ESBITT: May I just make one or two short observations, your Honor?

THE COURT: Very briefly, please.

MR. ESBITT: Your Honor made some reference in the course of this that this is part of the conspiracy. I would remind the Court that the Lee Avenue testimony and the Lee Avenue evidence did not relate to the conspiracy that was in the indictment.

THE COURT: You are absolutely correct on that

point. It was taken in part, however, as some prior similar acts, if I remember, and the only point I was observing was I could see that it could be important whether he was seen or not seen because you did not want to have in your record an inference that the man had an interest here and was listed as a rentpayer and was never even seen there.

MR. ESBITT: We don't deny he was seen, your Honor. She testified to that.

THE COURT: I am not assuming that the cross-examination was entirely without purpose or that you were, in the words of Mr. Wilson, shaking the tree. I think that it was important to establish that at least he went there because he had a connection with this clinic. He was on the rent roll. Apparently there was somebody working there whose fees he was sharing.

Am I correct in that?

MR. ESBITT: He did have an interest. Not in the Lee Avenue Clinic, but he did send chiropractors to that clinic.

THE COURT: And he paid rent to them?

MR. ESBITT: Either they paid rent or he had guaranteed that the rent would be paid. That is why the record showed he had sent checks to them.

THE COURT: He was on their rent roll? His name was on their rent roll?

MR. ESBITT: There was evidence of the Lee Avenue Clinic having received checks from Dr. Kavaler. I don't quarrel with that. I do want to refer again to Mr. Wilson having read in the record from page 31:

"Q And after reading that transcript, did you feel that you had lied in any respect or were inaccurate?

"A Not when I read the book you gave me."

The book that Mr. Wilson gave to that witness, Mrs. Silva, was not the entire transcript, it was that single page, page 1383, in which the only thing on the page was my cross-examination.

MR. WILSON: I object to that.

THE COURT: Don't interrupt, please, Mr. Wilson.

MR. WILSON: That is a misstatement of fact, your Honor. It is a plain misstatement of fact.

THE COURT: Please be seated.

MR. WILSON: She was shown three days of testimony, a big bound book.

MR. ESBITT: I don't quarrel with the fact he brought a big book in, but the only thing pointed out to Mrs. Silva, and that is confirmed by his statement and his witness, Mr. Hartwig, the only thing he showed

Mrs. Silva was my cross-examination and on the basis of that he convinced her there is nothing to see the judge about, but she did want to see the judge and she should have seen the judge, and your Honor should have made the decision and not Mr. Wilson as to whether or not there was a sufficient basis for resubmission to the jury.

THE COURT: At this time I will now make my findings and conclusions on this motion.

I will begin by saying that the motion, of course, is addressed to the discretion of the Court and has to be considered on the basis of the entire trial record, including the charges, the proof, the rest of the proof in the case, and all of the relevant facts, and ordinarily would not be granted in the absence of governmental misconduct unless it was found that the new evidence rose to a sufficient level which would probably produce a different verdict in the event of a retrial.

That is the touchstone upon which this motion must be approached and merely cumulative or collateral matters, particularly if they could have been discovered with due diligence prior to trial, will not ordinarily constitute sufficient new evidence to grant a new trial.

I think it is proper to cut through any argument on the issue and treat the matter just as if this

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information had come to the Court after the proof was closed and after the government had made its summation but prior to the defendant's summation while the jury, of course, had not yet received the case.

Perhaps the standards for reopening a trial which has been closed and proceeded halfway through summations is less severe but I really think that if the lady and Dr. Alizadeh had come in to see me, as hindsight tells us we all wish they had, I doubt very much I would have reopened the trial record even then based on her testimony before me at the hearing which I held on September 17.

Now, I would say from my observation of Mrs. Silva and hearing her and observing her demeanor that she is an honest witness, a well-educated person. She is a very capable person, a conscientious person who has a substantial job and who supervises the work of others in a difficult area of employment, and there is nothing about her which is lacking in judgment or discretion or willpower. And I would say also that understandably she is very favorably inclined toward the defendant, holds him in very high regard.

The same is true of Dr. Alizadeh.

The proof before me on the hearing shows clearly

to me that Mrs. Silva testified truthfully on September 17, she testified truthfully on the trial. She gave her best recollection as to a somewhat peripheral matter as to whether he actually worked, he being the defendant, in the Lee Avenue Clinic during 1972 or 1973 or in 1974, January, and her answer was very clear on the trial.

She said, "I'm not too sure." And she said, "Could be."

Her answers on cross-examination were truthful and it was relevant whether she saw him, as I mentioned earlier, it was just as much relevant from the defendant's point of view whether he had worked there or not.

The question of when he had worked at Lee Avenue became important in the trial only because of the suspicion which the government held and which it argued to the jury and which the Court believes might almost be inferred from a physical examination of Defendant's Exhibit AC and of a companion exhibit in the case, although I wouldn't go so far as to say it is clearly so beyond a reasonable doubt, but the government was arguing, not without reason, that these two books, because they conflicted with testimony of the patients and because they only covered a limited period of time and because of their relative physical newness and the similarity of the ink

and the handwriting from day to day, were a recent fabrication.

They also made the point they had not been produced pursuant to prior state and federal subpoenas and that they were **therefore a recent fabrication.**

That is the only relevancy of the testimony of Mrs. Silva on the trial. It was purely cumulative.

The most Mrs. Silva told the jury was that it "could be." That is the sum and substance of her testimony. She testified truthfully as to her then recollection. After she left the trial and after she began to think it over, she came to believe that perhaps her testimony was wrong and that she should have answered that he did not work there.

Besides the peripheral nature of this issue, this is not a case where false testimony was given or where the government sponsored and relied upon a perjurious witness; simply that her recollection was vague.

She told the jury her recollection was vague. She told the jury the truth and then a day or two later her recollection became more firm and more clear after she pondered on the matter some more.

Neither the jury nor this Court **should read** into a question what is not there, and questions have to

be taken on their face value, and the entire testimony of Mrs. Silva at the trial has to be taken on its face value.

I would say for the record that besides Mrs. Silva, and besides Dr. Alizadeh and the defendant himself, there are probably one hundred people available who could testify to the objective fact as to whether Dr. Kavaler ever treated patients at the Lee Avenue Clinic. So this was not an issue of fact which, if it had any importance, could not be traversed by others, and all that information was available from many other sources.

The government was leaning on very slender proof in the direct or cross-examination of Mrs. Silva to the contrary.

I am prepared to find that this testimony is purely peripheral and would not alter the outcome of the trial which, basically, depends on whether the patients who testified here were treated the number of times and on the dates that the billings signed by the defendant say that those patients were treated.

The proof was overwhelming that there were charges made for patients' treatments which were not given to the patients at the times and dates and locations specified by this defendant. That is what the jury found.

There is more than ample evidence here to find it.

Had the trial been reopened and Mrs. Silva said he was not working in Lee Avenue during those dates, the issue pertaining to Exhibit AC for identification would not have been materially altered and the real underlying issue of the trial would not be either.

Now, I really believe had she come in to see me I would not have reopened the trial record then. I see no reason for granting the motion now.

Of course, tested by hindsight, it would have been much better and certainly in accordance with our tradition had the prosecutor told defense counsel that Dr. Alizadeh and Mrs. Silva had come back to try to change her testimony. It is too late for that now. The government did not prevent her from seeing the Court. Both she and Dr. Alizadeh are intelligent people and self-willed and have strength of mind and could have and would have insisted on seeing the Court.

I am not prepared to find for certain what pages she actually read in the witness room of the trial record. However, I do find that she expressed her concern not over anything that she had said on direct testimony but she expressed her concern over the possible correctness of her cross-examination testimony.

The United States Attorney was acting properly

when he responded to the concern which she and Dr. Alizadeh expressed. So that if he showed her only the cross-examination, that was not improper, and I do not find that that was done with any intention to mislead or to overbear her or divert her from her desire to see the Court.

I find that she testified truthfully at the trial. A trial has to end some time and the fact that later on a witness has a different view of what his or her recollection is, particularly in such a vague and peripheral item as this, is simply not sufficient ground for this Court to set aside this verdict.

I refuse to find that the government prevented her or wrongfully induced her not to come in and see the Court.

I think the United States Attorney attempted to deal directly with the issue she raised fairly, and apparently the two of them left satisfied that she had not testified falsely and she told me on September 17, at page 25 of the hearing record, that she thought he was working there at the time when she was testifying, and that's all any witness ever testifies to in a trial, his or her best recollection.

The fact that she later remembers differently is,

as I believe I have said earlier, insufficient both in fact and law, and in the totality of the circumstances present here.

So, for those reasons, the Court concludes that the motion for a new trial be and hereby is denied.

The foregoing constitutes my findings of fact and conclusions of law on this hearing.

I will now set a date for you all to come back.

How about the 29th, General Esbitt? Is that all right with you? 9:30 in the morning?

MR. ESBITT: For sentence, your Honor?

THE COURT: Yes.

I am not prepared to impose sentence at this time. I have intentionally not gone into the question of the letters and the probation report. I didn't want to get those things in mind while I had this other matter open.

MR. ESBITT: I appreciate that. That date is satisfactory.

THE COURT: Is that satisfactory to you, Mr. Wilson?

MR. WILSON: I am on trial before Judge Wyatt next week.

THE COURT He doesn't start until ton, does he?

MR. WILSON: I have forgotten.

THE COURT: Ask him if he won't let you come here.

MR. WILSON: Perhaps I can ask to start a half hour later that morning.

MR. ESBITT: This room, your Honor?

THE COURT: Yes, this room.

Dr. Kavaler, you are continued on your existing bail arrangements until then.

The Court will be in recess.

. . .

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(ED. 4-28-71)

GOVERNMENT'S

EXHIBIT

U. S. DIST. COURT

S. D. OF N. Y.

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UNITED STATES GRAND JURY

SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA :

-v- :

JOSEPH INGBER and SHELDON STYLES :

- -x

United States Courthouse
Foley Square
New York, New York

January 22, 1976
11:00 A.M.

APPEARANCES:

GEORGE WILSON, Esq.

Assistant United States Attorney

Joann Sokol,
Acting Grand Jury Reporter

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140 NASSAU STREET
NEW YORK, N. Y. 10038

REctor 2-5566

CHARLES H. KENHER, called as a witness, having been duly sworn by the Foreman of the Grand Jury, testified as follows:

BY MR. WILSON:

Q Would you state your name and spell it for the record.

A Charles H. Kenher, K-e-n-h-e-r.

Q Mr. Kenher, are you an employee of the Department of Health, Education and Welfare?

A Yes, I am.

Q What is your position with that department?

A I am a Medical Services Specialist in the Medical Services Department of HEW.

Q How long have you been with HEW.

A About five years.

Q And have you been assigned by your agency to the United States Attorney's office for that district to assist in an investigation?

A Yes, I have.

Q How long have you been assigned to the investigation?

A I was assigned January 13, 1974. So, a little over a year and prior to that --

Q Two years.

SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE

A Oh, '75. I'm sorry. My mistake.

Prior to that, I worked for about two months in the summer of 1974 on the same investigation briefly.

Q This is the investigation which is generally known as the Ingber and Styles Medicaid fraud investigation?

A Yes, it is.

Q Mr. Kenher, in the course of your assignment to the investigation, have you been assigned to maintain various records and have you been present at interviews and have you worked with the evidence and material in this investigation?

A Yes, I have.

Q And you by virtue of the position in HEW, are you aware of the Medicaid regulations laws?

A Yes, I am.

Q And are you aware that on July 30, 1965 that Title 19 of the Social Security Act was enacted?

A Yes, I am.

Q And that was called the Medicaid Act?

A Yes.

Q And are you also aware that pursuant to a Medicaid Act, the United States Department of Health, Education and Welfare shares with each state the cost of the Medical Services to certain eligible families and

families of dependent children and to attend partial or totally disabled individuals whose income and resources are insufficient to meet the cost of necessary medical services?

A Yes, I am aware of that.

Q And these people are all considered to be federally eligible Medicaid recipents?

A Yes, they are.

Q Are there other types of Medicaid where the State Administration which is not eligible for federal reimbursement?

A That's correct.

Q And part of your duties with the Department of HEW, you are generally charged with administering that program and insuring that it runs smoothly?

A That's correct.

Q Isn't that a fact that the State of New York is delegated authority by Congress to administer its own Medicaid program?

A Yes, it is.

Q And is it also a fact that the Medicaid Act requires each state to promulgate a plan which must be approved by the federal government, which sets forth how it will administer its medical assistance programs?

A That's correct.

Q And are you also aware that the Medicaid program further provides for rehabilitat[illegible] and other services to help such families and individuals obtain or retain the capabilities for independence and self care?

A Yes, I am.

Q Are you aware that the State of New York has enacted a statewide plan fo[illegible] -- in accordance with the provisions of the Medicaid Act?

A That's correct.

Q That plan was enacted on May 1, 1966, was it not?

A Yes, it was.

Q And in the State of New York, are you aware that New York State Social Welfare has vast responsibility for the medical assistance program within its New York State, in the New York State Department of Social Services?

A Yes.

Q The New York City Department of Social Services is located at 330 West 34th Street in Manhattan?

A Yes, it is.

Q And at that office claims by various providers of Health Services, doctors, and chiropractors and ophthalmologists and osteopaths and dentists at other times

have medical-related service people make their claims to that office?

A Yes, they do.

Q Is that the office that they are processed and paid?

A That's where the claims are processed.

Q Is it not a fact that the nature and the amount of such claims reported medically by New York City to New York State Department of Social Services --

A Yes, it is.

Q -- on a monthly report, which is known as a Schedule E?

A Yes.

Q And in turn, does the New York State Department of Social Services submit quarterly to the Department of Health, Education and Welfare its report detailing the nature and amount of such claims?

A Yes, it does.

Q Does the Health, Education and Welfare act on these reports which reflects, in turn, the number and amount of claims at city level, computes and pays the State of New York on federally qualified claims fifty cents on a dollar?

A Yes, it does.

Q For every dollar spent on those claims?

A Yes.

Q You are also aware that various providers of Medical Services such as doctors, chiropractors are required to be, among others, are required to be licensed by the State of New York?

A They are.

Q These are professional licenses?

A Yes.

Q Does the State of New York have any separate provision for keeping track of its Medicaid providers?

A Yes, it does.

Q Do you know what the provision is?

A It has its own certification of its Medicaid providers.

Q And how is a person given a certification?

A A person would apply for it and it is processed by the Department of Social Services and then it's approved. The provider is given a number, a provider number with which he uses to bill the Medicaid program.

Q And every invoice that that provider submits must bear his provider number?

A Yes.

Q And that is how the city keeps track of the

amounts of the claims on the computer by provider number?

A That's correct.

Q And does each Medicaid recipient have a number?

A Yes, each Medicaid recipient is given, each family, I believe is given a number.

Q Will you describe to the Jury how they can -- before they have a number, how they show that number?

A Each Medicaid recipient is given a card on which a number is printed on and then when they require service, they present that card for billing purposes. The number is then taken from the card and is placed on the invoice.

Q So every invoice which bears the number for the provider and number for the recipient --

A That's correct.

Q And that is how the computer can keep track of the amount of services and to whom services are rendered?

A That's right.

Q Now, Mr. Kenher, is it a fact that during this investigation at several so-called Medicaid clinics or centers where several doctors who had worked were under scrutiny?

A That's right.

Q Among those are the private office of 9124 168th Street, Jamaica, New York?

A Yes.

Q Another one known as the Corona Medical Center, 105-5 Northern Boulevard, Corona, Queens?

A Yes.

Q And another one known as Queens Bridge Medical Group at 38-81 13th Street, Long Island City, New York?

A Yes.

Q And another one known as the Clairmont Medical Center located at 3589 Third Avenue, Bronx?

A Yes.

Q And another one known as Laconia, L-a-c-o-n-i-a Medical Center located at 40-20 Laconia Avenue, Bronx?

A Yes.

Q Another one known as H. I. N. also known as Central Medico, also known as St. Mary's, also known as St. Anne's, which is located at 567 East 149th Street in the Bronx?

A Yes.

Q Another one also known as Galler, G-a-l-l-e-r Medical Center located at 858 Flushing Avenue in Brooklyn?

A Yes.

Q Another one known as the Tenth Street Medical Center also located in Brooklyn?

A Yes, on Kent Street.

Q On Kent Street?

A Yes.

Q Another one known as the 8th Street Medical Center at 8-01 Astoria Boulevard, Astoria, New York?

A Yes.

Q Is it a fact that investigations revealed that you have learned through this investigation by way of hearsay that the alleged business of each of those clinics was to provide health care service to Medicaid eligible patients?

A Yes.

Q In fact, they catered to people on Medicaid?

A Yes, that's true.

Q Is it also a fact that these clinics were located in those parts of the city where there was a high percentage of people who would fall into the Medicaid eligible groups?

A Yes, they are.

Q And did the investigation also reveal that each clinic would consist of one or more chiropractors, medical doctors, optometrists, dentists, podiatrists who would work there either on a full or a part-time basis?

A Yes.

Q And most of these clinics were owned by Joseph

Ingber and Sheldon Styles and Mark Kavaler, K-a-v-a-l-e-r?

A Yes.

Q Also, one of the owners who was under investigation during the course of this investigation?

A Yes.

There were other owners.

Q And is it a fact that in most centers it was the practice to ping pong patients?

A Yes.

Q Would you explain to the Jury what ping pong is.

A Ping pong refers to the situation where a patient may come in for one specific ailment, regardless of what it is, a head cold, sore back or whatever. By the time they were through the clinic, they had seen every -- or practically every doctor in the place. They had seen the foot doctor, optometrist, the chiropractor, internist.

That's even whether or not they required treatment or examination in those specialties.

Q And did the owners of the clinic, various owners also hire and train women from the local neighborhood to act as secretaries and receptionists?

A Yes, they did.

Q They were instructed to wear white uniforms?

A Yes.

Q In some cases referred to as nurses?

A Yes.

Q And in many cases were taught to take blood samples?

A Yes.

Q Give x-rays?

A That's correct.

Q Administer all EKG tests?

A Yes.

Q And was it also a fact that in several of the clinics that they were instructed to take as much blood, not from one person, but as many different separate blood samples as possible?

A Yes.

Q That is because the ownership had an arrangement with Alpone, A-l-p-o-n-e Laboratories?

A That's right.

Q Whereby they would send Alpone all of their blood samples for analysis in return for a kickback by Alpone of between eighteen and twenty-two percent of its gross billings from Medicaid?

A That's correct.

Q The clinic would not bill for the blood tests,

but the laboratory would?

A Right.

The clinic was not allowed to bill since the laboratory did the tests.

Q And is it also a fact that the providers that work these clinics were encouraged to use services of a factor.

A They were.

Q In most cases the factor was the Queens Trading Company?

A Yes.

Q Mr. Joe Blum, B-l-u-m, the owner of Queens Trading Company?

A That's correct.

Q And the factor would come to the clinic on a periodic basis, would he not and pick up the completed invoices from the providers, tabulate the total claimed and immediately issue a check for the total, less twelve percent for his fee?

A That was a procedure, yes.

Q He would, in turn, secure authorizations from each provider, filed the form on behalf of the provider with the city and received the checks from the city?

A Yes.

Q Was it also a fact that in most cases the factor kicked back between two and two and a half percent of his fee to Ingber and Styles?

A Yes, he did that.

Q Unknown to most of the factors who were factors?

A Yes.

Q Factoring?

A Yes.

Q Now, what -- can you tell the Jury what expenses had to be paid by the provider out of the eighty-eight percent that he received from the factor?

A Well, the provider was required to pay rental. He had a rental agreement with the owner of the clinic. Depending on his specialty, he would have to pay anywhere from twenty-five to thirty and sometimes more percent of his gross Medicaid income after the factor had deducted his twelve percent to the clinic, to the owner, the clinic and rent and so forth.

Q Were these payments made to the corporation?

A Yes, to the corporation.

Q In some cases, were providers also required to pay an additional amount to Ingber and Styles personally?

A Yes.

In certain instances they were.

Q These chiropractors and podiatrists?

A Yes, specialists.

Q Is it a fact that these total payments would run anywhere from ten to seventy-five percent of that remaining eighty-eight percent?

A That's correct.

Q Depending on the scarceness of the particular specialty?

A That's true.

Q The chiropractor paying the most?

A Yes.

Q Now, during the course of investigation, did you learn that -- what the procedure was when a patient appeared at the clinic?

A Yes.

Q Tell the Jury what happened in your average case when a patient would appear at one of these clinics.

A From our interviews of many patients who did go to these clinics, the first thing that would happen to them would be one of the secretaries or receptionists would take a full family history of the patient and find out all family members, especially those eligible under the Medicaid program, since the Medicaid number was issued for a family, all children, let's say if the family would be covered by

that same number --

Q So, the initial patient visit would result in that patient's card being Xeroxed?

A Yes.

I should have mention that the card was Xeroxed and then returned to the patient.

But then the clinic had Xeroxed a copy of the card and of course, the number.

Q They had a list of all the family members and the year of their births?

A Right.

Q And the Medicaid invoice, all when needed to put on the invoice would be the patient's Medicaid number, last name, first name of the family member and the year of the family member's birth?

A That's correct.

Q Did you learn subsequently during this investigation that in many cases doctors and chiropractors would select from the medical files at random names of Medicaid members of patients and their members of their family and years of birth at random and use these to prepare false invoices?

A Yes.

Q Which are submitted to the city through the

factor?

A That's correct.

Q And did you also learn that chiropractors would prepare or cause to be prepared treatment plans and select names of patients at random and enter them on the treatment plans, cause those treatment plans to be mailed to the Department of Social Services of 330 West 34th Street in Manhattan?

A Yes, they did.

Q And those would be received and approved and mailed back to the clinic?

A That's right.

Q And the provider or person working for him would prepare false Medicaid invoices based on those treatment plans?

A Yes.

Q Submit them to the city through the factor?

A That's correct.

Q They would receive money from the factor and split it up in pre-determined amounts?

A Yes.

Q And in some cases in the case of both chiropractor and medical doctors, when patients are actually seen, were additional services added to the invoice for

services?

A Yes.

Q And that is generally called padding?

A That's correct.

Q Two types of fraudulent activities were submission of invoices, patients never seen at all and submission of invoices for patients seen, but with more than the number of services actually rendered on the invoice?

A That's right.

Q Did investigation reveal that generally the activities of Ingber and Styles and their associates, that these clinics started around the beginning of 1968?

A Yes, approximately then.

Q Continued up until about the end of 1972?

A Yes.

Q And at various times, some people entered and some people left the clinic?

A Yes, there was high turnover.

Q High turnover of various doctors?

A Yes.

Q During the course of the investigation, did you become aware of a medical doctor named Mordechai Yood, M-o-r-d-e-c-h-a-i Y-o-o-d?

A Yes.

Q Dr. Yood was a very old man who was suffering from senility?

A That's my understanding, yes.

Q And Dr. Yood was hired by Ingber and Styles at a fixed amount of approximately $250 a week to write invoices for them?

A Yes.

Q He would be required by Ingber and Styles, Stanley Reichler, who was the manager of the Corona Clinic and others to sign large amounts of blank invoices?

A Yes, he was.

Q Is it a fact that Mr. Reichler has produced a stack of blank consecutively numbered invoices, approximately twelve inches thick?

A At least, yes.

Q All which are blank and bearing nothing but the signature of Mordechai Yood?

A Yes.

Q Isn't it a fact that those invoices were filed and were submitted in Dr. Yood's name under his Medicaid number and that his checks were received from the factor and deposited into a joint bank account in the name of Yood at one point, Ralph Bell at another point and Sheldon Styles?

A That's correct.

Q This money was divided up among Ingber, Styles, Bell and others and Yood was paid a fixed amount a week?

A Yes.

Q And is it a fact that the pink copy of the three part Medicaid invoice form was saved at the clinic #2 and used by various doctors, including Dr. Bell and Ginsberg as a basis for writing new invoices for medical services?

A Yes, they were.

Q Is it a fact that the investigation revealed a great number of doctors and the invoices submitted by Doctors Bell and Ginsberg from their office at 57th Avenue in Queens were for patients who had been to the Corona Clinic, but never been to the 57th Avenue office?

A Yes.

Q Did you also learn, based on interviews with various patients, that Dr. Arthur Solomon, who is a gynecologist, that a pattern of padding invoices was discovered on his part?

A Yes, it was.

Q Is it a fact that according to the investigation that you learned that Dr. Solomon would in many cases give a woman a vaginal examination and nothing else, but yet bill

for certain gynecological procedures?

A Yes.

Q Including urinalysis?

A That's true.

Q And the investigation revealed, to the best of the patient's recollection, they never received those procedures, specifically the urinalysis?

A That's correct.

MR. WILSON: Mr. Foreman, would you excuse the witness, please temporarily.

THE FOREMAN: You are excused. Wait outside.

(Witness excused.)

(Time noted: 11:20 a.m.)

MR. WILSON: Ladies and gentlemen, a great deal of what Mr. Kenher has testified to as to the result of his actual examination are based on hearsay because he did not actually experience or see the things, but he heard them from someone else and the law allows you, if you wish, to reject hearsay and ask for us with the government to produce the original witness from which that hearsay emanated. You have this privilege. If you wish to do so, I will

be only to produce those witnesses for you.

Does everyone understand that Mr. Kenher's testimony is based on large part, on hearsay and I take it from -- off the record reflect that everyone appears to understand.

Mr. Foreman, does anyone desire to have any witnesses called?

THE FOREMAN: We have heard most of these.

MR. WILSON: Off the record.

(Time noted: 11:22 a.m.)

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(ED. 4-23-71)

GOVERNMENT'S

EXHIBIT

U. S. DIST. COURT

S. D. OF N. Y.

42-A

FPI-MI—9-24-75-50M-4417

UNITED STATES GRAND JURY

SOUTHERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA :

-v- :

JOSEPH INGBER and SHELDON STYLES, et al. :

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United States Court House
Foley Square
New York, New York

January 29, 1976
11:15 a.m.

APPEARANCES:

GEORGE WILSON, ESQ.,
Assistant United States Attorney

ANN DULE,
Acting Grand Jury Reporter

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C H A R L E S K E N H E R, called as a witness, having been duly sworn by the Foreman of the Grand Jury, testified as follows:

BY MR. WILSON:

Q Would you state and spell your name, please?

A Charles Kenher, K-e-n-h-e-r.

Q And you're an employee of the Department of Health, Education and Welfare?

A Yes, I am.

Q And have you been detailed to assist the U.S. Attorney's Office in this district in an investigation in Medicaid Fraud?

A Yes, I have been.

Q And during the course of that investigation, have you had occasion to interview witnesses and other members on the staff in which you were assigned have had occasion to interview witnesses?

A Yes.

Q And were any of these witnesses interviewed concerning the services rendered by a Dr. Mark Buthorn, B-u-t-h-o-r-n?

A Yes.

MR. WILSON: May this group of 33 documents be marked Grand Jury Exhibit 155? (So marked.)

Q Mr. Kenher, I show you what has been marked Grand Jury Exhibit 155, and ask you to just inspect those documents and tell the Jury if you've seen them before?

A Yes, I have.

Q When did you see them?

A In the course of the investigation. These are invoices submitted by Dr. Buthorn for services supposedly rendered to Medicaid recepients.

Q Were these recepients all interviewed, the ones that are listed on the invoices?

A Yes, they were interviewed by myself or members of this staff.

Q And notes were made of those interviews, were they not?

A Yes, they were.

Q Was there one patient named Elvira Burgos, B-u-r-g-o-s?

A Yes.

Q And is it a fact that Elvira took her children to the podiatrist once, but Dr. Buthorn billed three times?

A So she claims, yes.

Q And did she also testify that she saw a potiatrist only once or twice but yet was billed seven times by Dr. Buthorn for various visits?

A Yes.

Q And was there also a patient named Sonia, S-o-n-i-a, Camacho, C-a-m-a-c-h-o?

A Yes.

Q Who claimed she saw a podiatrist only once at the suggestion of the receptionist of the clinic but yet was billed by Dr. Buthorn for four visits?

A That's correct.

Q WAs Cecilia, C-e-c-i-l-i-a, Rodriquez interviewed?

A Yes.

Q And what was the result of her interview?

A Well, she claimed that she saw a foot doctor, a podiatrist, only once at the Hin Medical Center.

Q That's also known as Saint Mary's, Saint Anne's Central Medical, C-e-n-t-r M-e-d-i-c-o?

A Located in The Bronx.

Q What did she say about her treatment by Dr. Buthorn?

A She claimed she saw Dr. Buthorn only once and that she never had her feet x-rayed by a foot doctor, yet Dr. Buthorn bills her for four visits including two x-rays, one for the left and one for the right foot, which she denies.

Q Willie Mae Fogg, W-i-l-l-i-e, M-a-e, F-o-g-g. What did she have to say about her treatment by Dr. Buthorn?

A She has a son named Paul, and she testified that her son did see a podiatrist once, just for an examination, didnot receive any kind of treatment or medication from that examination, and did get a bill from Dr. Buthorn for her son Paul for diagnosis of weak foot and also for padding and strapping which is a procedure of placing an arch under the foot and then strapping it with a bandage, and she claims that this never occurred. Her son was never treated in any way like that.

Q What about Mercedes Ortiz?

A Dr. Buthorn billed her son, Jose, for treatment for an ingrown toe nail, and she claims that her son never suffered from an ingrown toe nail.

Q How many times was--

A Twice. There were two bills for treatment for an ingrown toe nail which she claims her son never received.

Q Now, Carmen Quinones, Q-u-i-n-o-n-e-s, was billed for several visits by Dr. Buthorn, is that a fact?

A Yes.

Q Is it a fact that she only--according to her testimony, she only went once to the podiatrist, but yet Dr. Buthorn billed her for five visits?

A That's true.

Q And is it a fact also, that although on three of

those visits, Dr. Buthorn in his claim said that he padded and strapped her feet, that her feet according to her testimony were never padded and strapped?

A That's correct.

Q And is it also a fact that in spite of the fact she testified she never had her feet x-rayed, that he has billed both the left and the right feet have been x-rayed on one occasion?

A Yes.

Q Did she also testify that her daughter, Alba, who was at that time 11 years old, went once with her sister, Luz, L-u-z, to see a podiatrist? Luz was to be seen, not Alba, but yet Alba wound up seeing a podiatrist for an exam only and that was the only time she ever saw a podiatrist?

A Yes.

Q And how many times did Dr. Buthorn bill her?

A Three times.

Q He claimed on three occasions he treated her?

A Three separate occasions, and she denies that.

Q And Ruth, who was at that time four years old according to her mother never saw a foot doctor at the clinic. Did Dr. Buthorn bill for treating the four year old child?

A Yes, he billed her for four visits.

Q Now, Jenny Galarza, G-a-l-a-r-z-a, was she examined

by Dr. Buthorn according to her interview?

A Yes, once.

Q And how many times was she billed by Dr. Buthorn?

A I believe four or five times. If I can check the invoices, I can give you a definite answer. Four times.

Q What about her children?

A HEr daughter, Marilyn, according to her mother saw the podiatrist twice, once for an examination, and she returned once for padding and strapping and she was also billed four times.

Q Now, Alexandria Ortiz. Had she been to see a podiatrist, Dr. Buthorn, or her family?

A Alexandria--

Q Let me ask you this question. Had the Ortiz family been billed by Dr. Buthorn?

A Yes.

Q And is it a fact that Dr. Buthorn billed for Sara, S-a-r-a, Ortiz for a visit on one occasion when, in fact, there is noone by the name of Sara in that family?

A That's correct.

Q And is it also a fact that one Juan Carlos never had his feet strapped but Dr. Buthorn billed him for strapping on May 13, 1971?

A That's correct.

Q And did she also testify that the family was ping-ponged to the podiatrist at the clinic?

A Yes, by the receptionist.

Q But only received an exam, no treatments?

A Yes.

Q And from your knowledge of the investigation, was that ping-ponging a common practice at the clinic?

A It appears to be a definite trend in the clinic. When the patients come in, the receptionist urges them to see Doctors other than the ones they came to see initially.

Q Now, Luis- Ortiz, L-u-i-s, had one podiatric exam as part of this ping-ponging, is that right?

A Yes.

Q Dr. Buthorn billed for strapping both feet and/or x-raying both feet, is that a fact?

A That's correct.

Q And what did his mother say? He was ten years old at the time. What did his mother say about whether he was strapped or x-rayed?

A His mother denied that he was ever treated by a podiatrist, and he received only an examination.

Q Now, was that also the same with Maria, who was eight years old at the time, who was billed for strapping both feet, for x-rays by Dr. Buthorn?

A That is correct.

Q That child was never strapped--

A Just an examination.

Q That child was never strapped or padded and was never x-rayed?

A That's right.

Q Now, turning your attention to another doctor, did you have an occasion during the course of your investigation to review witnesses, review evidence concerning Dr. Max Kavaler's invoices?

A Yes.

Q I'd like to hand you a total of 4 invoices which are treatment plans--

MR. WILSON: A total of six documents which I ask that they be marked Grand Jury Exhibit 156. (So marked.)

Q I hand you Exhibit 156 and ask you if you will examine those documents. Have you seen those documents before?

A Yes, I have.

Q And are those all invoices and treatment plans which appear to be signed by Dr. Kavaler?

A They are.

Q Were some patients treated by Dr. Kavaler interviewed?

A Yes, they were.

Q Rosa Linda Mendez. Is it a fact that Dr. Kavaler's invoices show three visits--let me withdraw that a minute.

Now, Rosa Linda Mendez is not one of the patients named in Dr. Kavaler's proposed indictment, but is it a fact that independent evidence showed up on a computer run which indicated Dr. Kavaler had billed her for three visits?

A Yes.

Q And was she interviewed and stated that she had never seen Dr. Kavaler either at the Galler, G-a-l-l-e-r, Clinic or at his private practice?

A Yes, she did.

Q Now, going to the people that are listed, Rosa Echevarria, E-c-h-e-v-a-r-r-i-a, was she treated at the Galler Clinic by a chiropracter?

A I believe it's the practice on Lee Avenue.

Q Was she treated by a chiropracter by the name of Napoli, N-a-p-o-l-i?

A Yes, she was.

Q And was she treated by any other?

A No.

Q And was she ever treated by--withdraw that.

And was an invoice submitted to the City by Dr. Kavaler for 13 visits?

A Yes.

Q And the 166 Lee avenue address,is Dr. Kavaler's private practice?

A Yes.

Q Did Dr. Napoli work at that address, do you know?

A Yes.

Q Another interview was Carmen Irizarry, I-r-i-z-a-r-r-y. Is it a fact that she testified that she went to Lee Avenue Clinic and saw one chiropracter there about five or six times?

A She said she saw two chiropracters there for a total of about five or six times.

Q One four more times than the other?

A Yes.

Q Is it a fact that Dr. Kavaler billed Carmen for ten visits?

A Yes, he did.

Q ANother witness named Maria Colone, how many times did she testify she saw Dr. Kavaler?

A She said at the most she saw him three times.

Q Was an invoice filed for treatment to Miss Colone?

A Yes. Dr. Kavaler submitted invoices for eleven visits within a 34 day period.

Q And she testified she didn't go to--never went to a chiropracter that often?

A That's correct.

Q Beatrice Lee went to a chiropracter, is that correct?

A Yes.

Q How many times did she go?

A She went just once as a result of a ping-pong.

Q She walked through a chiropracter's office?

A Yes. She was urged to see the chiropracter.

Q And did Dr. Kavaler submit an invoice for her?

A Yes, for eight visits.

Q Now, is there also some treatment plans which were submitted by Dr. Kavaler on all these people? Were there treatment plans submitted on Beatrice Lee?

A I believe there was, yes.

Q And Rosa Echevarria?

A Yes.

Q And both of these were--in the case of Rosa Echevarria, was a 13 visit invoice so there was a treatment plan for that, and Beatrice Lee--that's an 8 visit invoice, and there is a treatment plan for that?

A Yes.

Q And these treatment plans, show the the diagnosis, do they not?

A Yes.

Q And do they indicate that those particular patients were examined and a plan of treatment was devised?

A Yes, patient history is included.

Q And do they appear tobe signed by Dr. Kavaler?

A They do.

Q And does your investigation reveal that these treatment plans were submitted to the City and approved?

A Yes.

Q Is there a stamp of some kind on the treatment plan which indicates it has been received?

A Yes, there was a stamp from the Division of Medical Services, stamped received.

Q And both treatment plans?

A Yes, on the Lee and yes on the Echevarria.

MR. WILSON: Mr. Foreman, will you excuse the witness, please?

THE FOREMAN: You're excused.

(Witness excused.)

USA 33s - 475
(ED. 4-23-71)

GOVERNMENT'S

EXHIBIT

U. S. DIST. COURT

S. D. OF N. Y.

42 B

FPI-MI—9-24-75-50M-4417

D A V I D K A I S E R, called as a witness, having been duly sworn by the Foreman of the Grand Jury, testified as follows:

BY MR. WILSON:

Q Would you state your name and spell, please?

A David Kaiser, K-a-i-s-e-r.

Q Would you speak up so all the ladies and gentlemen can hear you? Mr. Kaiser, how are you employed?

A By the New York State Department of Social Services as an auditor.

Q And have you been detailed by that Department to work with the U.S. Attorney's office for this District on an on-going investigation of a medicaid fraud?

A Yes, I have.

Q And as part of your duties, you have analyzed and charted and figured out the processing of Medicaid Invoices from the time they are submitted by a provider to the time they are stored in a warehouse and also payment and claims, is that correct?

A That's right.

Q Have you had an occasion prior to coming before this Grand Jury to examine some Medicaid Invoices sumitted by various providers?

A Yes.

Q And did you examine a group of invoices which has been marked Grand Jury Exhibit Number 149 allegedly submitted by a Robert E. March?

A Yes.

Q And have you also examined a group of invoices which have been marked Exhibit 1--I'm sorry. 149 Treatment Plans, and Exhibit 150 which are invoices?

A Right.

Q Both of March? And Exhibit 151 which are invoices submitted by Dr. Theodore Ginsberg?

A Yes, I reviewed those.

Q And did you also review invoices or copies of invoices submitted by Dr. John Asher?

A Yes.

Q Which is Exhibit 152?

A Yes.

Q Did you also review some invoices which are now marked as Exhibit 155 submitted by Dr. Mark Buthorn?

A Yes.

Q And did you also review some invoices which are marked Exhibit 156 which are submitted by Dr. Max Kavaler?

A Yes.

Q And were you able to tell from these invoices whether or not they were submitted to the City of New York?

A Yes. There were various methods.

Q Would you explain briefly how you were able to tell?

A On those invoices that we have, original invoices, there are markings which specifically indicate that they were submitted and processed by a New York City Department of Social Services.

Q In other words, there are various steps and processing where people make notations and rubber stamp mark and the like, is that correct?

A That's correct.

Q And this is the case of Dr. Asher's Invoices which we don't have the originals of yet, we have yellow copies?

A That's right.

Q And can you tell the Jury where the yellow copies came from?

A The yellow copies came from the files of the factor and his records indicate that those bills which are the copies of those yellows had been submitted to the City and had been paid.

Q And you've reviewed the treatment plans, and is it a fact you can look at a treatment plan and tell a rubber stamp mark on the face that it has been received by the City?

A Yes.

Q And treatment plans that are returned are designed by an official of the City giving approval?

A That's correct.

MR. WILSON: Mr. Foreman, would you excuse the witness, please?

THE FOREMAN: You are excused.

(Witness excused.)

MR. WILSON: As part of Mr. Kenher's testimony to be added onto the end of this testimony, I want to advise the Jury that Mr. Kenner's testimony was based on hearsay, and you have the privilege as Grand Jurors to call for any or all of these patient-witnesses to come in and testify in person. You do not have tobe content with taking testimony of one person as to what another person is not present or said as hearsay. Is there anyone who does not understand the explanation I gave?

Mr. Foreman, judging by the lack of no hands being raised, I take it everyone understands. Does anyone desire to have any witnesses called? If so, will you raise your hand.

Mr. Foreman, may I assume that no one desires any witnesses to be called?

USA 33s - 475
(ED. 4-23-71)

GOVERNMENT'S

EXHIBIT

U. S. DIST. COURT

S. D. OF N. Y.

42-C

FPI-MI---9-24-75-SOM-4417

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'74 Add.

January 27, 1976
Re: Joseph Ingber, Sheldon Styles, et al.
Mr. G. Wilson — Arthur Krieger

A R T H U R K R I E G E R, called as a witness, having been duly sworn by the Foreman of the Grand Jury, testified as follows:

BY MR. WILSON:

Q Would you state your name, please, and your address.

A Arthur Krieger, 3804 31st Avenue, Astoria, New York.

Q You're a doctor of chiropractic, is that correct?

A Yes.

Q And back in the late '60's and early '70's were you associated or did you work at a clinic operated, owned and operated, by Sheldon Styles and Joseph Ingber? A Yes, I worked at one clinic.

Q What clinic was that? A The one in Corona.

Q That's located at 105- -- A 105- --

Q -- -05 Northern Boulevard? A Yes.

Q Both of us can't talk at the same time because the reporter can't keep up. Let me -- that was at 105-05 Northern Boulevard in Queens? A Yes.

Q And do you recall also seeing a Dr. Max Kavaler?

A Yes.

Q And was Dr. Kavaler also one of the owners of the clinic? A Yes, that's what I was told.

Q And there came a time when yourself and other chiropractors engaged in a course of padding invoices and submitting invoices for patients never seen? Is that correct? A Yes.

Q And is it a fact that, for a period of time, that

you, yourself, prepared fraudulent invoices under the Medicaid program, submitted them to the City? A Yes.

Q And do you know of other chiropractors having done that also? A Yes.

Q Do you know that, as a fact, Drs. Styles, Ingber and Kavaler knew of this practice and encouraged it and received an override or a percentage of the money that every chiropractor received from the City from that person's Medicaid billings? A Yes.

Q What percentage did you pay to Styles, Ingber and Kavaler? A Thirty per cent.

Q Thirty per cent? A Yes.

Q In addition to twenty-five per cent you paid for rent to the clinic? A Um, I believe it was thirty per cent for rent, and then thirty per cent of the balance of that went to Dr. Ingber in my case.

Q You paid so much to the factor - twelve per cent, was that it? A Yes.

Q And then, of the remainder, you paid thirty per cent for rent? A Yes.

Q And of the remainder of that, you paid thirty per cent direct to either Ingber or Styles, which was your kickback or your fee you paid for the privilege of working their clinics? A Yes.

Q It was the override they got? A Right.

Q And that was divided up; you don't know how it was

divided up? A I don't know.

Q Were you ever present when Ingber and Stules discussed fraudulent invoices? A Yes.

Q And who else was present at these conversations? A Uh, a couple of conversations Dr. Kavaler was present, in the Corona clinic.

Q And what year was this, do you recall? A It was in 1970.

Q What was said at these conversations, to the best of your recollection, either the specific words or, if you can't recall the specific words, the substance of the conversation? A The substance of the conversations was in relation to adding visits onto invoices that the patient had not actually made, or billing for visits that were not made.

Q Did the conversation generally go in terms of,"How much are you billing, get your billing up," or, "You're not billing high enough," comments of that nature? A After the -- yes. After it was known that --

Q Known by who? A By Ingber, Styles and Kavaler, and other people in the clinic, that invoices were being submitted which had extra visits on them, and the conversation then went about the amount being billed and the number of visits put down, that sort of thing.

Q And, of course, it was known by Ingber and Styles and Kavaler, was it not, because they were actively supervising or encouraging to various chiropractors and other doctors

to pad their billings,-- A Yes.

Q -- to increase their billings, because the more they were increased or padded, the more they would get on override? A Yes.

Q And Dr. Kavaler was present on these discussions where padding was discussed? A He was present at a few of them.

Q Where you were present? A Where I was present.

Q He has no idea how many you were -- you have no idea how many times he was present where you were not present; -- A Yes.

Q -- you're talking about just the ones at which you were present. A Yes.

Q All right, you may be excused.

FOREMAN: You're excused.

[WITNESS EXCUSED]

USA 23a - 475
(ED. 4-23-71)

GOVERNMENT'S

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

42-D

FPI-MI--9-24-75-50M-4417

January 27, 1976 A 487 3509

Re: Joseph Ingber and Sheldon Styles, et al.

Mr. G. Wilson Joseph Howard Ingber

J O S E P H H O W A R D I N G B E R, called as a witness, and having been duly sworn by the Foreman of the Grand Jury, testified as follows:

BY MR. WILSON:

Q Please state and spell your name.

A Joseph Howard Ingber (spelled).

Q What is your address? A My home address is 24 Landing Road, Glen Cover, Long Island.

Q Dr. Ingber, did there come a time in the late Sixties, 1968, 1969, when you formed a business partnership with Dr. Sheldon Max Styles? A Yes.

Q Who at that time, I believe, was going under the name of Sheldon Udin, U-d-i-n. A I'm not sure when he changed his name but it was around that time. He could have been using either name at that time.

Q You're a chiropractor? A Yes, I am.

Q Licensed by the State of New York?

A Yes, I am.

Q And back at that time you were certified as a Medicaid provider? A That's correct.

Q And Dr. Styles at that time was allowed to practice chiropractic in the State of New York?

A Yes, he was.

Q He, too, was licensed as a Medicaid provider?

A At the very beginning he wasn't but he became certified as a provider also.

Q Did you and Dr. Styles open up a practice in Jamaica, Queens? A Dr. Styles joined me in practice which was in existence in Jamaica, Queens.

Q What was the address at that time?

A 91-24 168th Street in Jamaica.

Q Did there come a time when you took in an associate by the name of Max Kavaler? A Yes.

Q Dr. Kavaler was also a Doctor of Chiropractic

A Yes, he is.

Q And also certified to render Medicaid treatment under the Medicaid bill? A Yes, that's correct.

Q Did there come a time when Dr. Kavaler started working in the Clinic with you and Dr. Ingber?

A Dr. Styles you mean.

Q Dr. Styles. When was that? A Yes, he joined us in some portion of 1969, I believe, in the Jamaica office.

Q Was that early '69, to your recollection?

A Yes, that's when it was.

Q Did there come a time when you had a conversation with Dr. Kavaler about writing Treatment Plans for patients? A Yes. The Treatment Plan load became very heavy since we were seeing many new patients each session and it became overwhelming, and I asked Dr. Kavaler to help make out Treatment Plans on some of

my patients and some of Dr. Styles' patients, and Dr. Kavaler would make out the Treatment Plans. I would hand him a group of Treatment Plans on patients he had not seen and I would say, "Write up five or six of these on Upper Back conditions and write the rest up on Neuritis and Low Backs; mix them up." And he would write up Plans on patients that had nothing to do with any actual problems that the patients may or may not have had.

Q So, a portion of the Treatment Plan was set forth in Diagnosis. It had no relationship to the person who was shown on the Treatment Plan?

A In many cases it did not. In one case or another, a brief notation he might have picked up and elaborated on that but, certainly, the symptoms and the whole outline bore no correlation to actual conditions.

Q A Treatment Plan is required, Dr. Ingber, is it not, in order for the City to approve payment for treatment in cases of three visits?

A That's correct.

Q This document was usually mailed to the City, approved and returned?

Cont'd by E.J.C.

Q [Continued] And it's kept and a copy of it is sent in with the final invoice which has all the visits on it, is that correct? A That's exactly right.

Q Now, did there come a time when, in order to increase business, increase Medicaid business, you and Dr. Styles and Dr. Kavaler would engage in a practice known as ping-ponging at your office? A Not the Jamaica office, because that was just the chiropractic office.

Q All right. At a later time you opened a clinic and engaged in ping-ponging? A That's correct.

Q Would you explain what ping-ponging is. A Ping-ponging is what we called patient utilization. It was a euphemism for it. What we would do, we would take an initial history of the patient and then send them to every doctor in the clinic if possible.

Q You say, "we" - the receptionist? A Right, we would get the basic information on the patient and, in addition to the doctor that the patient wished to see, that doctor would send the patient on to the next doctor, and the next would send them on to the next.

Q So, in other words, if a person came in with a sore throat, that person - and brought her child because she couldn't get a babysitter - that person and her child would be seen by an optometrist, a dentist, - if there was on - a foot doctor and a chiropractor and a medical doctor?

A We were trying to encourage the patient to see as many

doctors as possible and try to justify it.

Q But the main reason was to increase Medicare billings?
A That was our main reason.

Q A person would walk into a doctor's examining room, that doctor would exchange greetings with the patient, ask a few questions, and then that doctor would write an invoice for whatever his particular specialty was, is that correct?
A Yes.

Q Back in 1968, before moving to Corona, did there come a time, or were there times, when you and Dr. Styles and Dr. Kavaler would sit down and write treatment plans, just make up treatment plans in bulk, to justify the billings?
A Yes. In fact, it happened on many occasions that we'd sit down, and Dr. Kavaler was very good at writing treatment plans, so at times he would complain that Dr. Styles wasn't writing enough and he was too busy to write all these treatment plans, and I would encourage him and say, "Look, you're very good at this."

Q Were these treatment plans -- withdrawn. Were invoices submitted based on these treatment plans? A Yes, they were.

Q Did these invoices reflect one or more visits by patients to various chiropractic offices mentioned on the treatment plan? A Well, first of all, they were based on non-existant conditions or exaggerated conditions. Secondly, the patients in many, many, many cases were not seen at all after the initial work-up. In other cases they were seen for

some of the visits and in some cases where they kept coming in, they were seen for a full visit. They were encouraged to come in for all the visits, but whether they did or not, they were billed for all the visits.

Q The 168th Street office, which was a chiropractic office, anybody that came there at least, or even for only one time, would be seen by someone? A Yes.

Q By a chiropractor? A That's correct.

Q And later a treatment plan would be submitted with that patient's name thereon?-- A In ninety-five per cent of the cases.

Q Let me finish the question. A Sorry.

Q And as a result, a treatment plan would be submitted in the person's name, signed and written by a doctor who may not have been the one who had seen the patient, initially? A That's correct.

Q And then after that treatment plan was approved, that same doctor would submit, sign and submit, an invoice for doctor's services, which would include in many cases the full allowable amounts of visits on the treatment plan, -- A Yes.

Q -- or authorized by the treatment plan? A Most cases every visit was authorized would be submitted for, whether or not the patient had come in.

Q So a patient could come in for fifteen visits and he'd be billed for fifteen visits, -- A That's correct.

Q -- cases like that; and cases that patients came in

for four or five visits and stopped coming in, and billed for fifteen visits? A That's right.

Q And you had occasions where a patient never came back after the first time, and a treatment plan would be prepared and an invoice for fifteen visits? A When a patient never came back, we would have places where we'd use only seven or eight visits. Those are the ones that we'd vary to show --

Q So you wouldn't -- A Wouldn't get a pattern. Obviously not ever patient could come in every time, so we started mising it up a little bit.

Q Did there come a time when you opened up a clinic at Corona, Queens? A Yes.

Q What was the address? Was that 105-05 Northern Boulevard? A That's correct.

Q And do you recall approximately when you opened that clinic? A Uh, I believe that was either in late '69 or early '70, in that time frame.

Q And the owners of that clinic included you, Sheldon Styles and Max Kavaler? A Yes, they did.

Q Were there a couple of other owners also? A Yes.

Q Who? A Harvey Tanz [spells] and Martin Kane [spells]

Q Martin Kane was a lawyer? A Attorney, right.

Q Harvey Tanz was a chiropractor? A Right.

Q Did you for a time have Dr. Kavaler manage that clinic A Initially Dr. Styles managed it, and when we opened our

second center in Brooklyn, Dr. Styles went to manage that and we brought Dr. Kavaler over from Jamaica to run the Corona clinic.

Q And then Dr. Kavaler was sent to another clinic which Styles had opened up after that? A Then when the first 13th Street office opened, which would be the Queensbridge Medical Building, when that opened, Styles went to Queensbridge, Kavaler went to Galler, and Stan Reichler was brought in to go into Corona.

Q Stan Reichler managed the Corona clinic?
A R-E-I-C-H-L-E-R.

Q Now, the Galler, G-A-L-L-E-R, clinic was located at 858 Flushing Avenue in Brooklyn? A That's correct.

Q So Dr. Kavaler started 168th Street office, went for a period of time to Corona, where he managed it for a short period of time, and thereafter was sent by you and Dr. Styles to run the Galler clinic? A That's correct.

Q And did Dr. Styles in your relationships, where you opened various clinics, was he the man in charge of going in, breaking the ground, opening the new clinics? A Yes, Dr. Styles would set up the procedures and train assistants and nurses and set up a center.

Q Did he also, to your knowledge, train Dr. Kavaler in how to run a clinic? A Yes, he did.

Q What did he teach him? A He attempted to teach him how best to get full patient utilization.

Q Meaning ping-ponging? A Ping-ponging.

Q Was there a fact he had different colored cards to use to make sure a patient would see every kind of doctor in the clinic? A There were coded cards. In one sense they were a color code. I'm not sure when he introduced that. He had a system to make sure - flags and so forth - to make sure the patients were not missed by any service.

Q Did he also arrange there would be blood tests taken as much as possible? A Yes, he encouraged a blood test would be taken on every new patient.

Q And is it a fact that you - that is, you and Styles - had an arrangement with an Alpone Laboratories [spells], whereby you would send them all your blood work, and in return they would kick back eighteen, twenty, twenty-two per cent of their billings to Medicaid for doing this blood work? A I didn't have a personal relationship with Alpone Lab, no. They --

Q Sheldon Styles did? A That I'm unaware of. I know that the center had a percentage rent arrangement - in other words, the corporation did - and as far as to the best of my recollection, I didn't have any personal -- I may have --

Q Sheldon Styles arranged that? A Yes.

Q And Alpone Lab would pay back money to the center in the form of rent? A Yes.

Q And this rent was in reality a kickback on the lab tests, was it not? A I didn't see it that way. I saw it as rent. You could say then that every doctor was kicking

back if you looked at it that way.

Q Except that every doctor was working for the clinic and Alpone Labe was not - just sent a man to pick up blood tests. A This was an answer.

Q Dr. Ingber, Alpone Laboratories did not rent, actually rent, any space from the clinic; all it did was service the clinic by performing this blood work, is that correct? Is that a fact? A They had a room in the clinic that was considered their room, and they had their supplies in that room.

Q And that was the room to justify their paying the rent? A I'm not saying it was a fair rent. I'm just saying that's how we set it up.

Q Just yes or no, was that the room that justified receiving rent? A Yes.

Q On that they paid a rent based on the percentage of gross business they did with Medicaid from your clinics?
A That's correct.

Q So, in any event, Sheldon Styles broke Max Kavaler in to how to manage a clinic, which included how to ping-pong patients and how to keep records, is that correct?
A That's correct.

Q Did you have conversations with Max Kavaler, you and Sheldon Styles, from time to time, concerning padding Medicaid invoices? A Yes, very frequently.

Q And what type of conversation would these be?
A Well, these would be conversations based on the fact that

Dr. Styles wanted to bill considerably larger amounts of invoices than either Dr. Kavaler or I wanted to bill, and they would be in the form of arguments, and sometimes they got quite heated, in which Dr. Kavaler would get angry at Dr. Styles, and back and forth.

Q In effect, there was a disagreement among the three partners, or at least you three owners, as to the extent of the fraudulent billing, -- A Exactly.

Q -- the reason being that, to a greater or lesser extent, you and Dr. Kavaler felt that excess billing would arouse attention? A Yes, we were afraid that we'd get in trouble if we were too blatant.

Q And Dr. Styles was not as conservative as you and Dr. Kavaler? A Yes, he said there was nothing to be afraid of.

Q Did Dr. Kavaler ever say that he did not want to submit fraudulent invoices at all, or just he wanted to keep it down to a reasonable level? A "Let's keep it down to a reasonable level" would be his attitude.

Q Did he, in fact, supervise, both Corona and Galler, the submission of ping pong and the submission of various chiropractor padded invoices? A Yes.

Q And also, in some cases, podiatrists? A Yes, he supervised all those things.

Q And as late as - your recollection - 1970, do you recall conversations at Corona between you, Dr. Styles and Dr. Kavaler concerning padding of invoices? A Well, we had

these conversations mostly in the office in Jamaica.

Q Let me ask you this. What's the latest date at which you had conversations with Dr. Kavaler concerning - discussing - the amount of fraudulent invoices which should be submitted? Did you have them as late as 1971? A The last conversation I had with him, I think, was March, April or May, during that area, of 1971. Dr. Kavaler decided that he wanted to get out of the Corona and Long Island City practices and wanted to trade off his stock in those centers for stock, our stock, in the Galler center, Brooklyn center.

Q So is it a fact he gave you his stock in both of Corona and Queensbridge centers, plus a sum of cash, in return for all the stock you and Dr. Ing- - Styles - held in the Galler center? A That's correct. Right, he gave us stock in two centers, plus cash, plus he divested himself of his override in both Drs. Mosner and Krieger and --

Q This override that you speak of, he would get a percentage of the billings written by Dr. Moser and Dr. Krieger? They would have to pay him money? A Yeah, the override --

Q Yes or no? A Yes.

Q Would they pay him that through the Galler center or directly to him? A No, they paid it to me and I split it with him, or they paid to Dr. Styles and Styles split. In other words, one check.

Q So Dr. Krieger and Moser -- A Mosner.

Q -- would receive their money from the factor, who

would factor their invoices for twelve per cent, ten to twelve per cent, -- A Correct.

Q -- would give you and Dr. Styles a certain percentage of the remainder. Do you recall what that percentage was? A Yes, He would pay twelve per cent to the factor. Of the net, he would pay twenty-five per cent to the center.

Q For rent? A For rent. Of the balance, he would pay - let's take Dr. Mosner, for example - either fifty-fifty or sixty-forty, depending on the time we're talking about. At one point it was fifty-fifty of the balance he would pay to Styles, myself and Kavaler.

Q And what about Dr. Krieger? A I think Krieger had somewhat the same deal. Percentages might have varied from time to time. I'm not too clear on what -- but, basically, it was the same effect.

Q And other chiropractors also paid these to you and Styles and Kavaler and you split between yourselves? A Correct.

Q Is that the fact that Dr. Krieger and Dr. Mosner and several other chiropractors who paid this override were padding the invoices? A Yes, it is.

Q In some cases in very large amounts? A Yes sir, that's true.

Q And so Dr. Kavaler gave up that override -- A In addition to his percentages.

Q -- to taking over Galler, himself? A Yes.

MR. WILSON: Would you excuse the witness, please.

FOREMAN: You're excused.

[WITNESS EXCUSED]

USA 33s - 475
(ED. 4-23-71)

GOVERNMENT'S

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

42-E

FPI-MI—9-24-75-50M-4417

SHELDON STYLES, called as a witness, having been duly sworn by the Foreman of the Grand Jury, testified as follows:

BY MR. WILSON:

Q Would you state your name and spell it, please?

A Sheldon, S-h-e-l-d-o-n, Styles, S-t-y-l-e-s.

Q Mr. Styles--Dr. Styles, you are a chiropracter?

A Yes.

Q And you're the Sheldon Styles who had a business partner, Joe Ingber and Max Kavaler, and one or more Medicaid Clinics during the years 1969 and 1971?

A That's correct.

Q Will you speak up so everyone can hear you?

A That is correct.

Q Did there come a time at your Jamaica Office or what is known as Jamaica Clinic, which is the private office at 168th Street when you and Joseph Ingber and Max Kavaler prepared chiropracter treatment plans?

A Yes.

Q Would you tell the Jury--how many occasions did this happen?

A It happened on a daily basis.

Q For how long? For what period of time?

A I think it started with Joe Ingber and I in the

latter half of '68, the Medicaid Form Preparation, and Max Kavaler came in early in '69, and during that period of time and until we began the first clinic at Corona, we submitted a tremendous amount of treatment plans and invoices, and we would sit, write them up, usually one of us wrote for two or three of the others. We had Dr. Friedman then coming in.

I would write for Joe Ingber, I would write for Max Kavaler. They would write for me. Treatment plans.

Q And were the treatment plans related to patients that were seen by the persons drawing the treatment plan?

A The patients came in and the treatment plan was prepared after the first visit and the treatment plan was then submitted for additional visits.

Q Now, did you write up treatment plans for patients that had not been seen?

A No.

Q So you took information that would be put on the treatment plan from patients who actually came in, that is the name of the patient on Medicaid?

A Exactly.

Q But the treatment plans that were actually written up and submitted had no relationship to any particular patients? You matched names with treatment plans, is that a fact?

A 503

A We took a symptom such as neck pain, and wrote it up on the treatment plan and the way we felt it would be accepted for the maximum amount of visits.

Q And it had no relationship to what the patient actually had or did not have?

A Other than the part of the body involved.

Q Every patient has a neck, but--

A Neck problem ,low back problem.

Q Is it a fact that you would sit around and determine--you would write up so many neck pains, so many low back problems, so many other types of problems to get a spread of average type of chiropractic complaints?

A Yes.

Q And these were matched up to patient's names and submitted to the City?

A Right.

Q And is it a fact that you would write or cause to have written invoices which would match those treatment plans which would be submitted in either your name, Ingber's name, or Kavaler's name?

A That's correct.

Q And was Kavaler aware of this practice?

A From the inception.

Q And did he cooperate in it?

A He cooperated completely.

Q Was he a little bit conservative as to the amount of paper that would be submitted?

A Well, initially it started very slowly for Max Kavaler. Most of the patients were being handled by Joe Ingber, and I didn't have a Medicaid Certification Number in the early stages, but it wasn't more than the first day or two before Max had asked me, "Are these people coming in for all their visits?" and I said, "Sometimes they don't."

He said, "What did you do?", I said, "We drop a few visits here and there, try and make it look reasonable and realistic."

Q In effect, telling him that you billed for as many visits as you are authorized to bill for but not in every case so there wouldn't be a pattern--

A Right.

Q But not in every case so a pattern wouldn't be seen by the authorities?

A Right.

Q Now, did there come a time when youopened up other clinics?

A Yes.

Q Did you open up a Corona Clinic?

A I did.

Q Do you recall to the best of your knowledge when you opened that clinic?

A April, '69.

Q And for a while was Max Kavaler manager of that Clinic?

A No. I was the manager of that Clinic.

Q Did you have him work in that Clinic for a couple of weeks before you hired Stan Reischer?

A I had him not working there in the sense that he was receiving a salary for it, but he was coming in often to learn how the procedures were for managing the Clinic.

Q Now, these procedures for managing the Clinic, did you teach Kavaler how to run the Clinic?

A Yes.

Q What did you teach him?

A We had various color coded cards for each patient. The patient who had seen a podiatrist might have a buff colored card for podiatry and a green color for chiropracter and yellow for optometry, and on the front of the cards we quoted a number for each service, and I showed Max how to make sure that if the patient came in, a new patient, that by the time that they left they had numbers 1, 2, 3, 4 or whatever services were there.

Q Would they have a different colored card or did

they vary if-- A 506

A Each service had a different colored card. White was medical.

Q After a patient left, after having been ping-ponged through every different service that they would have a colored card for each of those services?

A Right

Q So, after the first visit, the way you had it planned the patient would have one of each color?

A Right.

Q If you are able to have him go to every service?

A And it usually worked/

Q And this was done in order to inflate the Medicaid billings which the Clinic received a percentage of in rent?

A That's correct.

Q And was there also an override or a certain percentage in which chiropracters paid to do, Ingber and Kavaler, for the privilege of working in the Clinic?

A That's correct.

Q And did Dr. Kavaler share in this override?

A Yes, he did.

Q Did there come a time when you opened the Galler Clinic, G-a-l-l-e-r, at 858 Flushing Aenue in Brooklyn?

A Yes.

Q And did you put Kavaler in charge of that Clinic?

A I was originally in darge of that Clinic when it opened. I supervised the construction and the set up of the clinic, and when Queensbridge opened in December--

Q That's the Clinic at 13th Street in Astoria?

A 13th Street, 3818 13th Street, in Astoria. When Queensbridge opened, I needed a replacement for me in Galler and Max was very anxious to come into Galler.

Q And did you give Max instructions to learn how to run Galler?

A Yes, he stayed with me for quite a while.

Q Did he learn how to ping-pong?

A He already knew that he gets as many patient visits as possible out of every patient.

Q As part of this ping-ponging was the Clinic personnel also encouraged and told to take blood samples, as many blood samples as possible?

A That was part of their job.

Q And, in fact, you had an arrangement with a laboratory where they would kick back between 18 and 22% of gross for the billings?

A That's right.

Q So, and you characterized it as rent?

A Right.

A 508

Q And were there certain doctors that you recall off hand that you knew were writing either phony invoices or padding their invoices that worked in Galler?

A In Galler?

Q Yes.

A I think Dr. Jawer, J-a-w-e-r, was there for a while. He is a podiatrist. Dr. Gerber, a chiropracter.

Q And to your knowledge, did Max Kavaler know that these doctors were padding their invoices or writing false invoices?

A Max was receiving a percentage of Dr. Gerber's income.

Q And he was at the clinic, when Dr. Gerber--

A He was there when Dr. Gerber was there. Dr. Gerber had a number of discussions with him about patient load. He wanted more patients, and he wanted a bigger cut. Also he didn't want to pay us quite as much, and I didn;t get along with Dr. Gerber, so I asked Kavaler to handle Gerber.

Q Kavaler dealt with Gerber as far as Gerber's over-ride?

A Kavaler collected money from Gerber.

Q Now, addressing your attention to another matter, do you know a Dr. John Asher?

A 509

A Yes, I do.

Q Where did Dr. Asher work allegedly?

A Primarily in Clairmont.

Q Clairmont is located at 3589--

A Third Avenue in The Bronx, and I think for a brief period of time he was in Queensbridge and perhaps in Laconia.

Q Now, the medical doctors had a different arrangement for chiropracters with the management of these clinics, did they not?

A Because we were anxious for the medical coverage and we had the medical coverage and everything else would fall into place.

Q With chiropracters and podiatrists it was a buyers market, and they paid dearly for the privilege of practicing, but medical doctors is the other way round, and you were delighted to have them, and they were able to practice for between 25 and 30%?

A That's correct.

Q In rent and that would include the secretarial service and--

A Everything.

Q The rent at the clinic?

A All their equipment and supplies. They never had to lay out a penny.

Q What did you recall Dr. Asher's--

A In the 25 to 30% range.

Q How was the rent paid to you,if you can recall? Withdraw that.

Did Renee Nolan--she was employee of yours, was she not?

A Yes.

Q Was she in charge of handling the payments in the factor checks to and from the doctors?

A Yes.

Q Do you recall if REnee Nolan handled Dr. Asher's checks and made deposits--

A Yes, she did.

Q Don't anticipate, please. Renee Nolan as part of her duties would make deposits in the bank accounts for the clinic?

A Yes.

Q Would she deposit Dr. Asher's checks?

A Yes.

Q Did Dr. Asher to your knowledge ever pay cash directly to you and Styles (sic) or other management people or give checks to you or Styles (sic) or other people not made out to the clinic to the best of your knowledge?

A No.

Q So, to the best of your knowledge, Dr. Asher rented between 25 and 30% and all of this went into the clinic, into the corporate bank?

A Right.

Q Doctor--was that Dr. Asher ever required to pay 40%?

A No I don't think so.

Q Do you recall charging any medical doctor 40%?

A No. As a matter of fact, many medical doctors paid 15%, some paid nothing.

Q 15?

A 15. Some paid nothing. The only way it could ever go would be down.

Q So, you were certain that doctor Asher never paid more than 30% at the most?

A Very certain.

MR. WILSON: Mr. Foreman, excuse the witness.

THE FOREMAN: You're excused.

(Witness excused.)

USA 3[illegible]-475
(ED. 4-23-71)

GOVERNMENT'S

EXHIBIT ID

U. S. DIST. COURT
S. D. OF N. Y.

42-F

FPI-NI—9-24-75-50M-4417

EJC-1

c. '74
Add.

March 11, 1976 Rena Morey

Re: John Doe A 512

Mr. Rosenthal

R E N A M O R E Y, called as a witness, having been duly sworn by the Foreman of the Grand Jury, testified as follows:

BY MR. ROSENTHAL:

Q State your name and spell it, please. A Rena Morey [spells].

Q Miss Morey, you're connected with the United States Attorney's Office at present, is that correct? A Yes.

Q And have you assisted in the investigation of Medicaid fraud involving, among others, Max Kavaler? A Yes.

Q In connection with your duties with the United States Attorney's Office, have you had occasion to interview various patients or to examine the records of other patients who have been interviewed by other personnel affiliated with the United States Attorney's Office? A Yes.

Q And have you determined that, with respect to Dr. Max Kavaler, there are a number of patients and a number of invoices which -- well, that there are a number of invoices which are false, fictitious or fraudulent in respect that they reflect visits that did not occur or patients who were not treated at all by Dr. Kavaler? A Yes.

MR. ROSENTHAL: And will you mark this as Grand Jury Exhibit No. 160. [So marked]

Q Looking at Grand Jury Exhibit No. 160, is that a list of the names of the patients and the invoice numbers for those people that you've determined, based on either your

interviews or the interviews of other people, who have not been seen by Dr. Kavaler the number of times indicated on the invoices reflected on that sheet? A Um, --

Q Let me rephrase that. You've got a list in front of you of invoices and patient names? A Yeah.

Q Those are patients that have been interviewed by you or other people in the United States Attorney's Office? A Right.

Q And based on those interviews, have you concluded that the invoices listed next to those patients' names are false, fictitious and fraudulent in respect that there are more visits reflected on the invoices than patients actually had with Dr. Kavaler? A Yes, except with some of them, they weren't sure as to how many visits there were - just one or two - but they were sure they did not go as many as the times indicated.

Q So with respect to all those patients, there are more visits reflected than actually occurred? A Yes.

MR. ROSENTHAL: Ladies and gentlemen, let me remind you again that portions of Miss Morey's testimony are hearsay, in that she's telling what other people declared, told her; and if you desire, you can subpoena the original declarants, the people that have first-hand knowledge of these matters. On the other hand, you're entitled to consider hearsay in connection with your deliberations.

Q Now, Miss Morey, the counts reflected here on this handwritten document, Grand Jury Exhibit 160, two through twenty-seven, those are substantially -- those are the same people and the same invoices reflected in the remaining counts of the indictment, Counts 28 through 53, is that correct? A Yes.

Q You've made a comparison of those? A Yes.

MR. ROSENTHAL: I have no further questions of the witness at this time.

FOREMAN: You're excused.

MR. ROSENTHAL: If you'll wait outside in case there's anything else.

[WITNESS EXCUSED]

A 515

Grand Jury Exhibit 160

COUNT	DATE	NAME	INVOICE NUMBER
2	3/31/71	Beatrice Lee	M 272614
3	3/31/71	Jose Reyes	M 272626
4	3/31/71	Willie Walker	M 272623
5	5/25/72	Alberta Harris	M 272648
6	9/6/72	Alberta Harris	M 272699
7	5/25/72	Lillian Velasquez	M 272654
8	7/13/72	Celeste Manley	M 272679
9	8/16/72	Rosa Rodriguez	Y 485813
10	8/16/72	Herman Pas	Y 485810
11	8/16/72	Alice Rodriguez	Y 485805
12	7/13/72	Gerda Muniz	M 272690
13	8/16/72	Nilda Cordero	Y 483808
14	9/6/72	Nelly Celange	Y 485821

(Title 18, United States Code, Sections 287 and 2)

A 516 Grand Jury Exhibit 160

COUNT	DATE	NAME	INVOICE NUMBER
15	3/31/71	Rosa Echevarria	K 890324
16	3/31/71	Maria Colon	K 890326
17	3/31/71	Sheila Einhorn	K 890323
18	3/31/71	Minerva Rodriquez	K 890316
19	3/31/71	Rachel Espinosa	K 890322
20	3/31/71	Yolanda Rodriguez	K 890332
21	3/31/71	Luz Quinones	K 890333
22	3/31/71	Jasmin Arroyo	K 890327
23	3/31/71	Celi[illegible] Mattias	K 890320
24	5/7/71	Elisa Ruiz	K 890359
25	5/7/71	Lucilda Creque	K 890362
26	5/7/71	Ada Torres	K 890356
27	5/7/71	Carmen Irizarry	K 890360

(Title 18, United States Code, Sections 287 and 2)

A 517

Defendant's Exhibit B

File

July 29, 1976

George E. Wilson

United States v. Kavaler - S 76 Cr. 241

On July 28, 1976 immediately after my summation-in-chief in this case, a recess was called. Jack Hartwig advised me that Dr. Alezadeh and his assistant Mrs. Silva were outside the courtroom. Mrs. Silva had reported that she thought she had testified falsely by saying that she saw Kavaler work at the Lee Avenue clinic in 1972 and 1973.

During the recess I and Jack Hartwig met with Dr. Alezadeh and Mrs. Silva in the witness room. I showed her her testimony on cross by Mr. Esbitt (which only dealt with whether she had seen Kavaler during this period). Mrs. Silva, after reading her testimony appeared to be relieved that she had not testified falsely and it was apparent that she was mistaken in her recollection of the questioning by Mr. Esbitt. Having satisfied myself that Mrs. Silvaspresent recollection was not at odds with her testimony, I returned to court which was reconvening.

G.E.W.

USA 33s - 475
(ED. 4-23-71)

DEFENDANT

EXHIBIT D
U. S. DIST. COURT
S. D. OF N. Y.

FPI-NI—9-14-78-50M-4417

A 518

United States Department of Justice

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREW'S PLAZA
NEW YORK, NEW YORK 10007

ADDRESS REPLY TO "UNITED STATES ATTORNEY" AND REFER TO INITIALS AND NUMBER
GEW:n
76-0402

July 13, 1976

BY HAND

William Esbitt, Esq.
122 East 42nd Street
New York, New York 10017

Re: United States v. Kavaler
S 76 Cr. 241

Dear Sir:

I am enclosing a stipulation for your signature.

The stipulation which we have previously agreed upon will be forwarded in a few days. You will recall that it concerned the authorship, submission, payment and subsequent processing of Doctor Kavaler's Invoices for Doctors Service and their accompanying Treatment Plans which we intend to offer into evidence.

The one which is enclosed for your consideration is requested in order to avoid having to force Jay Abberman, Esq. to cancel a long-planned vacation to Europe which is to take place during the trial.

In accordance with Judge Brieant's request to assist you in focusing on Brady material, I invite you to review our Ingber and Style debriefing and other specific files and listen to several tapes containing their conversations. Although those tapes will be designated as 3500 material they have not been transcribed as they are, in our judgment, utterly worthless. However, you should be the final judge of that.

Our 3500 material is now complete and we will turn it over to you at your convenience. Please arrange to have a messenger pick it up. (I might add that you have already seen most of this material during your several visits to our office.)

GEW:n
76-0402

BY HAND
William Esbitt, Esq.
122 East 42nd Street
New York, New York 10017

July 13, 1976
Page 2.

I will also furnish you copies of our computer printout on the patients and on Doctor Kavaler's activities. This is done with the understanding that they are incomplete and in many cases contain evidence of substantial fraudulent invoices by Doctor Kavaler's associates. Medical records are also available on some of the patients.

I will also provide as "potential Brady material" copies of our investigator's notes of the patient interviews. We do not consider this material as constituting 3500 material as it constitutes neither the verbatim or substantially verbatim statements of any witness, nor were any of the notes reviewed, adopted or approved by any witness. The material is being offered as "potential Brady material" under the most liberal interpretation of that rule even though there is nothing, in our judgment, in the material that can rationally be considered such. We only make it available in the spirit of complete and open discovery and to obviate a potentially frivolous issue on appeal. This is not meant to be construed a new policy of our office but only an attempt to give you every opportunity to present the true facts to Doctor Kavaler and perhaps obviate a trial.

You will recall that at our last conference with Judge Brieant we requested reciprocal discovery of all medical records and x-rays of any patient named in the indictment. It was generally agreed that this material would be furnished. We have not received it and have accordingly issued trial subpoenas duces tecum for their productions on the first day of trial. I would ask that this material be furnished prior to that time. I have not asked for a pre-trial conference for the purpose of a return on our subpoena as it would appear to be an unnecessary imposition upon the Court's time. The production of this material in advance would only be a reciprocation of the same spirit of cooperation and complete discovery shown by our office to date. You and your associate, Mr. Hanrahan, have spent several days combing our files.

One last matter--both Mrs. Eve Guarrasi and Norma Rosario, who are former employees of Doctor Kavaler, refuse to come to our office for a pre-trial meeting to discuss their potential testimony on behalf of the government. This is true in spite of the fact that both have previously

A 520

BY HAND
William Esbitt, Esq.
122 East 42nd Street
New York, New York 10017

consented to do so, without, I may add, any threats--contrary to the information which you furnished me in our June 30th telephone conversation. I understand from what you told me during that conversation that you have advised them they have no legal obligation to appear prior to their subpoena date. Please advise us whether you represent these witnesses or intend to call them for the defense. Their continued refusal to cooperate (albeit having no legal obligations to do so) as a result of your counseling and perhaps that of Doctor Kavaler, will serve only to delay the trial. Please let me have your thoughts on this.

Our pre-trial discovery obligations appear now to have been met. If there is anything further that you need, please advise.

Thank you for your cooperation.

Very truly yours,

ROBERT B. FISKE, JR.

By: George E. Wilson
GEORGE E. WILSON
Assistant United States Attorney
Tel. No.: (212) 791-1952

cc: Hon. Charles L. Brieant, Jr.
United States District Judge
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Received by WE 7/14/76 at 10:50 hours WE

(ED. [illegible]1)

DEFENDANT

EXHIBIT D
U. S. DIST. COURT
S. D. OF N. Y.

Patient Rosa Echevarria was interviewed by Telephone on 11/14/75 7:40pm by B. FERNANDEZ

Patient clearly he calls having gone to the clinic at 161 A. Lee Ave. in Brooklyn for a twisted foot. And was heffered to Dr Anthony Napoli.

SHE Saw Dr. Napoli, one for treatment and was not seen again by a Chiropractor Since she Says she had gone to the clinic Several times for GYN reasons and other times to see a general practitioner.

Invoice # K 890324 made to the N.Y. DSS 3/31/71 By Dr. Max Kavalar lists 13 visits. Patient Says She is Sure she was not treated by Dr. Kavalar

She said (Crossed out) that it said no known she did not recognize name

Invoice # S. 896408 Made to the N.Y. DSS on 5/23/72 lists 13 visits. By Patient to Dr. Napoli

Patient SAYS she saw him once.

Gave made his offer to MAX

NB: She explains this as being a typo which has since been corrected by DSS

A 522 (1)

June 30, 1976

ROSA Echevarria Lee Ave. moved to Penn St 1970?
350 South Second - went to ~~Lee~~ Ave. moved from Penn St. to Troop Ave. sometime in ~~1969~~, 1971? 72? Went to Lee Ave. clinic from ~~both~~ all addresses.

When moved to Troop Ave. sometimes took children to other medical centers:
Troop Ave.
Dr. Caballe Kathy had asthma 2 or 3 times
715 Bdway - took Jose for sore throat
another medical center - for both children.

When on Troop Ave - only went to Lee Ave herself. sometimes children also treated at Lee Ave.

Ladies in neighborhood when on ~~Penn~~ South 2nd St. told Mrs. E about Lee Ave clinic. She went first time for herself for vaginal problems. Saw Dr. Aledecc ??
→

(2)

Went back: saw dr. for kids, saw doc. for throat for herself.

Mrs. E saw general doc - she had pains. Headaches - had kidney infection - back, leg pains. Dr. sent her to chiro. (around 1940 - when moved to Penn. St.???

Saw a chiro - treated ~~by~~ w machine. treated Mrs. E 1 or 2 times, then he sent her to an X-RAY in same building then went back to him about 6 or 7 times. went about 1 time every 2 or 3 weeks. Never went 3 times in same week.

2 chiros at clinic. Not sure if treated by 1 or 2 dr. But knows she got appt. card from Dr. Napoli.

Moved to Troop - 71? - kicked [illegible] - first hurt - saw ~~first~~ dr - he tested, didn't see what was wrong. Mrs E decided to go to Chiro.

Saw chiro - foot massage
saw 1 or 2 times. Present??
Then pain went away.

Didn't see chiro. again

At clinic this year —
approached by Kessler
Mrs. E wrote note

Went to see Ave. to get forms
filled out for camp for Kathy +
Rose. would end of April 1976.
spoke her to receptionist/sec?
Lady got Rose records. She
came back w MR + notebook
w names. Lady said Ms. E and
mentioned 3 other names of
parents, were contacted by
investigators. Ms. E told her?
~~that Kessler could not~~
~~testify for me~~ that it
was impossible for her to
have seen Dr. Kessler 16 x in
a month. Then lady said
Dr. Kessler wanted to talk
to her. Ms. E. said. OK -

Kaeder
came. Took Mrs E to
small room - he introduced
himself - said people from
medicaid wanted to put
him in jail, take his horse
away. Ms. E said she never
saw him like in one month.
He showed her small notebook,
said that book had times
he saw her. Said he had
more records in his horse
called his wife, gave her
name + was given her maiden
Ave address. Said it must
be same person.

Asked Ms E to write
a note for him. She wrote a note
in Spanish saying she
saw Dr. Kaeder 8 or 10 x
in a year.

Dr. Kaeder told her
about all the good things
he was doing for Spanish
people and that a good
doctor he is.

Ms E felt sorry for
him. She did might have seen
him 8 or 10 times in a year,
but she knows she doesn't
see him that many

A 526

times in one mouth. & She would not write that She saw him 8 or 10 times in one mouth.

NB: She also told (but did not put it in the letter) that she did not see him that many times in 1 month - only 8 ~ 10 X in one year.
(this probably will not show up in note)

(ED. 4-23-71)

DEFENDANT

EXHIBIT D
U. S. DIST. COURT
S. D. OF N. Y.

P

A 527

United States
General Accounting Office
Form 213 (Rev. 12-66)

KAVALER

152-9663

By A. FERNANDEZ
01/29/76

Jose Reyes Medicaid # 2550987

Spoke to Patient through an Intermediary Spokesman. Patient is 80 years old and Not mobile. However this Interviewer overheard patient's Conversation with Spokesman.

Patient said that he had gone to the Gallen Medical Center (Centro Medico) for backaches one or twice but definitely Not 20 Visits.

Patient sounded clear and sure when he related message to his Spokesman.

General: Because of age patient will be going that transportation be provided if he should be required to testify. Patient speaks Spanish only but speaks well & clear

528

July 1, 1976

Rachael Espinosa

85 Vernon Ave - moved March 1971 (lived in different places 612 Marcy Ave sister-in-law) then moved to Elmrod St.

March 1971 - separated from husband.

1971] clinic -
went to 505 Marcy Ave - Dr. Serbu?? G.P? Mrs + kids kids might have seen other doc.
505 moved then Lee Ave. Reception's since 1969? - 1970.
(MS - nervous - tranquilizers)
Debra - rash.

Not sure when started at Lee Ave. Gyn. Aeccidi?
Mrs - back. chiro.

Might have seen chiro some day at gyn. Not sure who suggested chiro. Was E first visit to a chiro. Gyn doc? receptionist? or chiro. himself.

Positive not 8 times

Might have been more than one chiro at Lee Ave - Elmrod they were partners.

Has chiro treatment after Marcy + Vernon 599 Marcy → Lee Ave clinic - Probably around 1973 - 1974 - stiff neck. Maybe 2 or 3 times.

*U.S. Government Printing Office: 1974 — 553-628

(ED. 4-22-71)

DEFENDANT

EXHIBIT 5
U. S. DIST. COURT
S. D. OF N. Y.

Rachel Espinosa

telephone interview
2/13/75
R. Morey

went to Lee Ave. around early 1971, mostly to Dr. Alekalis

went to chiro once, maybe twice, at Lee Ave. — has had some chiropractic treatment at other places

Went when had pain in neck/back area (stiff neck); did not go for treatment series

Did not go 8X in 4 weeks

Name "Kavalec" is not familiar to her

A. FERNANDEZ

A 530

MARIN COUNTY INTERVIEW 12/22/75

INVOICE # 850326 3/31/71
Dr Max Kaplan. Patient Say this she saw Dr. Kaplan at the very most 3 times. She did not See Him 11 times. And she did not receive a Series of 12 treatments as Stated on treatment plan of 2/20/71. Patient says that as a matter of habit she would not see a doctor for Consistent treatment "even if she was dying"

INVOICE # 478330 - Anthony Nazoli
Patient never had increase headaches. She says it is possible that she may have seen doctor Napoli once not more. But it is definite that she didnot see him more than once, and there is a strong possibility that she didnot see him at all.
She says that she saw a CHIRO about three times in all 2 different doctors with a short period of time then she didnot see any at all. Time Space between the Visits of the two Doctors is well over one Year

Patient was Concerned about the closeness of Appointment dates. She says that she simply doesn't do this. Only once when she was taking injections for anemia

(ED. 4-23-71)

DEFENDANT

EXHIBIT D
U. S. DIST. COURT
S. D. OF N. Y.

R

Utah - Cedar

prelim

relevant to

Gr. Basin 1971

Lab Cal

Any chro only 3 x

in one drawn

2. never wait to chart -

Every 3 - 4 days in

1 month -

3) Chart as a spread

sheet - the week

summary -

Vol Control

A 532

Emilia Colon

never went to clinic in Corona

~~Bron~~ — Central Ave. in Brooklyn
. Knickbockor Prof. Art.

call in for interview
when invoice for
Kavalek is found.

was not treated by chiro
2X wk.

USA 32s - 475
(ED. 4-28-71)

DEFENDANT

EXHIBIT ID
U. S. DIST. COURT
S. D. OF N. Y.

S

A 533

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT
OCT 13 PM '76
S.D. OF N.Y.

UNITED STATES

-against-

MAX KAVALER,

Defendant.

Docket Number 76 Cr. 241

Charles L. Brieant
(District Court Judge)

NOTICE OF APPEAL

Notice is hereby given that Max Kavaler appeals to the United States Court of Appeals for the Second Circuit from the ☒ Judgment/☒ order ☐ other and *

(specify) _____ entered in this action on September 29, 1976 (Date).

*Order entered September 24, 1976 denying motion to set aside verdict and to grant a new trial.

KOSTELANETZ & RITHOLZ
(Counsel for Appellant)

Address By Lawrence S. Feld

80 Pine Street
New York, New York 10005

Date October , 1976

To:
Hon. Robert P. Fiske, Jr.
United States Attorney for the
Southern District of New York
1 St. Andrews Plaza
New York, New York

Phone Number (212) 422-4030

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY) TRANSCRIPT INFORMATION – FORM B

▶ QUESTIONNAIRE

☐ I am ordering a transcript
☒ I am not ordering a transcript
Reason:
☒ Daily copy is available
☐ U.S. Attorney has placed order
☐ Other. Attach explanation

▶ TRANSCRIPT ORDER

Prepare transcript of
☐ Pre-trial proceedings
☐ Trial
☐ Sentence
☐ Post-trial proceedings

▶ DESCRIPTION OF PROCEEDINGS FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDE DATE).

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ▶ Method of payment ☐ Funds ☐ CJA Form 21

ATTORNEY'S signature | DATE

▶ COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and forwarded to Court of Appeals.

Date order received	Estimated completion date	Estimated number of pages.

Date _____ Signature _____
(Court Reporter)

ORIGINAL

27

COPY RECEIVED
ROBERT B.
DEC 1976
SOLDIERS, N.Y.

Rec'd 2 Copies